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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 3012

EARL P. COOK,

Plaintiff,

vs.

BEN W. FORTSON, JR., AS THE DULY APPOINTED, QUALIFIED, AND ACTING SECRETARY OF STATE OF THE STATE OF GEORGIA; J. LON DUCKWORTH, CHAIRMAN OF THE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA; GRACE CANNINGTON, SECRETARY OF THE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA; AND THE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA, AN UNINCORPORATED ASSOCIATION,

Defendants

To the Supreme Court of the United States:

Pursuant to the provisions of Rule No. 12 of the Supreme Court of the United States, the above-named plaintiff and appellant files this his separate statement particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to

review the order and judgment denying interlocutory injunction, appealed from herein, as follows:

(a) Basis upon Which It Is Contended That Supreme Court Has Jurisdiction and Statutory Provisions Believed to Sustain Jurisdiction.

The Supreme Court of the United States has jurisdiction of this cause upon appeal by virtue of the fact that it is a direct appeal under Sec. 266 of the Judicial Code as amended (U. S. C. A. Title 28, Sec. 380), and allowed under Sec. 238 of the Judicial Code as amended (U. S. C. A. Title 28, Sec. 345). The complaint was brought under the provisions of U. S. C. A., Title 28, Sec. 41, subsection 14, and the prayers are for a Declaratory Judgment and for further relief by way of a writ of injunction, pursuant to Judicial Code Sec. 274d (U. S. C. A. Title 28, Sec. 400).

(b) The Statutes of the State, and the Rules of the Democratic Party Having the Force of Law by Virtue of Such Statutes, the Validity of Which Is Involved.

The laws of the State of Georgia, the validity of which are attacked directly as unconstitutional as aforesaid, are to be found in the Code of Georgia of 1933 (Annotated), which is the official edition of said Code, Book 12, Part VI, Chapter 34-32 (pages 91 through 99), and more especially Sections 34-3212 through 34-3218 (pages 95 through 99), the latter Sections, as originally enacted, being found in Georgia Laws, 1917, pages 183 through 189.

The "county unit rule," which is here attacked as unconstitutional may be appropriately summarized (from Sec. 34-3212, at page 96, Book 12 of said Code) as follows:

> "Candidates for nomination . . . who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of

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such county on the county unit basis, that is to say, two votes for each representative to which such county is entitled in the lower House of the General Assembly . . ."

Sec. 34-3217 of said Code (page 99, Book 12), which permits, and as Appellant contends, invites the application of the "county unit rule" to Congressional primary elections is set out verbatim:

"Limitations.—Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nominations for members of Congress, judges of the superior courts, solicitors general, members of the General Assembly and county officers; and this law shall not be construed to require a primary for any of the last-named officials, except in their respective districts, circuits or counties, as provided by law: Provided, however, that primaries for nomination of members of Congress, judges of the superior courts, solicitors general and members of the General Assembly shall be held on the date named in section 34-3212 for primaries for United States Senator, Governor, Statehouse officers, Justices of the Supreme Court and Judges of the Court of Appeals. (Acts 1917, p. 189)."

Section 34-3209 of said Code is as follows:

"Party Authorities May Formulate Additional Rules.—The party authorities shall, in all matters not provided for in this Chapter, formulate rules and regulations for holding said primary election and for making returns thereof to the proper party authorities. (Acts 1908, pp. 55, 57)."

Section 34-3210 of said Code is as follows:

"Time and Place of Election; Returns; Declaration of Result.—Every such primary election shall be held at the time and place, and under the regulations prescribed by the rules of the party, organization, or association holding the same, and the return shall

be made and the result declared as prescribed in this Chapter. (Acts 1890-1, p. 210; 1900, p. 40; 1908, p. 55)."

The rules of the respective Democratic Executive Committees which are alleged to have the force of law and to be unconstitutional are:

"*Rule VIII.* (of the State Committee)

Insofar as the Primary relates to the nomination of candidates for Congress from various Congressional Districts, such candidates shall be voted for only in the counties comprising their respective districts; and the Congressional Democratic Committee of each District shall determine whether the county unit or popular vote plan shall prevail."

"*Rule IV.* (of the Fifth Congressional District Committee)

A candidate receiving a plurality of the votes cast in a county shall be entitled to the unit vote for said county and the candidate receiving a majority of the county unit votes cast in said primary in said District shall name delegates from each County in the District to a convention of delegates to be held in the City of Atlanta, Georgia, on Saturday, July 27, 1946, at 11 o'clock A. M. in the Senate Chamber of the State Capitol. The delegates so appointed shall go to the convention and declare as the nominee the candidate who receives a majority of the County Unit votes cast in said primary.

"The number of delegates from each county shall be twice the number of representatives which said county has in the House of Representatives of Georgia.

"When said delegates have assembled in convention, they shall organize by the election of such officers as such convention may deem necessary and shall then proceed to declare as the nominee for Congress from the Fifth Congressional District the candidate receiving the majority of the County Unit votes cast in the primary."

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In order that the Court may comprehend fully the basis for the contention of Appellant that the rules of the Democratic Executive Committee of the State of Georgia, and of the Democratic Executive Committee of the Fifth Congressional District of the State of Georgia are, and should be declared to be, a part of the election machinery of the State of Georgia, and have the force of law, and to be unconstitutional, the attention of the Court is directed, in addition to those portions of the Code of Georgia already pointed out, to Sections 34-3215a and 34-3223 through 34-3236, appearing in 1945 Cumulative Pocket Part Supplement to Book 12 of said Code, pages 37 through 42 of said Supplement. Inasmuch as said Sections are not directly attacked as unconstitutional, they are not summarized or quoted herein.

(c) Date of Judgment

The judgment appealed from was entered on the 24th day of August, 1946, and filed on the 26th day of August, 1946.

The application for an appeal was presented on the 13th day of September, 1946.

(d) Nature of the Case and Rulings of the Court Bringing the Case Within the Jurisdictional Provisions Relied upon.

The appeal herein is from a judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, denying the relief prayed for, the said Court before which this cause came on for a hearing being a court composed of three judges as by statute (28 U. S. C. A. Section 380) provided, said action being for a Declaratory Judgment and for further relief by way of a writ of injunction, to declare the aforesaid rules of the Democratic Executive Committee of the State of Georgia, and of the

Democratic Executive Committee of the Fifth Congressional District (above set forth) to be a part of the election machinery of the State of Georgia, and to declare unconstitutional the pertinent laws of the State of Georgia and the aforementioned rules of said Democratic Executive Committees, as applied to Congressional elections, as depriving plaintiff (appellant here) of the right secured to him and to each of the members of the class which he represents, by Article I, Sec. II, of the Constitution of the United States, and guaranteed by Amendment XIV thereto, to cast one entire vote, and to have said vote counted on an equal basis with every other vote cast by a qualified elector within the Fifth Congressional District, for a Member of Congress from said Congressional District.

(e) Grounds upon Which It Is Contended the Questions Involved Are Substantial

(1) By virtue of the said laws of the State of Georgia, providing for primary elections on the county unit basis, which are invalid upon their face when applied to Congressional elections, plaintiff, and each member of the class which he represents, is deprived of the right secured to him by Article I, Sec. II, of the Constitution of the United States, and guaranteed by Amendment XIV thereto, to cast one entire vote, and to have said vote counted on an equal basis with every other vote cast by a qualified elector within said Fifth Congressional District, for a Member of Congress from said Congressional District.

There are many members of said class. Of the qualified electors residing in Fulton County, Georgia (which has a population of 392,886 according to the 1940 Census), 41,981 cast their ballots, as did Appellant, for Mrs. Helen Douglas Mankin, the candidate for the Democratic nomination for Member of Congress from said Fifth Congressional District who received both the plurality and majority of all popular

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votes cast in said District in said primary election held July 17, 1946. Each of said ballots has been diluted and deprived of its force and was overridden by a substantially smaller number of votes cast elsewhere in said District. The constitutional right of each of these 41,981 electors is represented here by appellant.

This Court has frequently concerned itself with the disfranchisement of individuals contrary to the Constitution; how much more should it concern itself with this wholesale disfranchisement, of 41,981 individuals who voted, as well as of additional thousands who may have failed to vote because their votes were practically of no effect. An additional 100,000 votes cast for this same candidate in Fulton County would not have altered the result one whit.

While, as Appellant contends, the case is governed in principle favorably to Appellant's contentions by numerous decided cases of this honorable Court, the case is, upon its facts, a case of first impression, involving grave Constitutional questions.

(f) Cases Believed to Sustain Jurisdiction

Wiley v. *Sinkler*, 179 U. S. 58, 63;
Nixon v. *Condon*, 286 U. S. 73;
Colegrove v. *Green*, 90 L. Ed. 1212.

(g) Matters in Which the Specially Constituted District Court of the United States Abused Its Discretion

(1) It was the duty of the District Court to exercise a sound judicial discretion in granting or withholding relief;

(2) Stating that the case at bar is controlled in principle by the decision in *Colegrove* v. *Green*, 90 L. Ed. 1212, and that therefore equity should grant no relief, the Court refused to exercise its discretion.

(3) This refusal to exercise its sound discretion, appellant contends, amounted in law to an abuse of discretion.

(4) If it can be said that the District Court exercised its discretion in denying the interlocutory injunction prayed, upon the authority of *Colegrove* v. *Green, supra,* said Court abused its discretion, for, as appellant contends, the majority opinion in *Colegrove* v. *Green, supra,* shows upon its face that the rights there involved were the rights of a State, whereas, the rights herein sought to be protected are private rights of citizens of the United States.

(5) If it can be said that the District Court exercised its discretion in denying as aforesaid the interlocutory injunction prayed, said Court abused its discretion in so denying such relief, for the reason that the questions presented by plaintiff-appellant's application for interlocutory injunction were grave, and it appeared from plaintiff's complaint that the injury to plaintiff and to the class he represents would be certain and irreparable if the application were denied, and the final decree should be in his favor, whereas, if the injunction had been granted, the injury to the defendant, Ben W. Fortson, Jr., the Secretary of State of the State of Georgia, even if the final decree should be in favor of all the defendants, would have been inconsiderable, inasmuch as neither said Secretary of State nor any of the other defendants has any personal interest in the subject-matter of the complaint, and none of them would suffer any personal injury or damage.

(h) A Copy of the Opinion of the District Court Is Hereto Appended

Dated: This 13th day of September, 1946.

Respectfully submitted,

ALEX W. SMITH,
CROOM PARTRIDGE,
Solicitors for Plaintiff-Appellant.

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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

Civil Action No. 3012

EARL P. COOK, *Plaintiff*,

vs.

BEN W. FORTSON, JR., as Secretary of State of Georgia; J. LON DUCKWORTH, Chairman, Democratic Committee of Georgia; GRACE CANNINGTON, Secretary, Democratic Executive Committee of Georgia; and DEMOCRATIC EXECUTIVE COMMITTEE OF GEORGIA

This cause on August 16, 1946, came on for a hearing for an interlocutory injunction before a court of three judges as by statute provided, composed of Hon. Frank M. Scarlett, District Judge duly designated to hold court in the Northern District of Georgia, and Hon. Samuel H. Sibley, Circuit Judge, and Hon. Louie W. Strum, District Judge for the Southern District of Florida, who were called to assist.

After hearing evidence and argument and taking time to consider, upon the Findings of Fact and Conclusions of Law filed herewith It Is Ordered and Adjudged

That the petition of Mrs. Helen Douglas Mankin to intervene and dismiss the cause be denied;

That an interlocutory injunction be denied.

This August 24, 1946.

SAM'L H. SIBLEY,
United States Circuit Judge;
LOUIE WM. STRUM,
United States District Judge;
F. M. SCARLETT,
United States District Judge.

Filed in Clerk's Office Aug. 26, 1946. F. L. Beers, Clerk, by C. A. McGrew, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

Civil Action No. 3012

EARL P. COOK, *Plaintiff*,

vs.

BEN W. FORTSON, JR., as Secretary of State of Georgia; J. LON DUCKWORTH, Chairman, Democratic Executive Committee of Georgia; GRACE CANNINGTON, Secretary, Democratic Executive Committee of Georgia, and Democratic Executive Committee of Georgia

The plaintiff, suing in behalf of himself and others similarly situated, avers that he is a Democrat qualified to vote in the general election to be held Nov. 5, 1946, and is pledged to vote for the Democratic nominees therein; a Democratic primary election was held July 17, 1946, to nominate a candidate for the House of Representatives of the United States for the Fifth District of Georgia embracing the Counties of Fulton, DeKalb, and Rockdale; in the election 104,554 votes were cast, 53,882 for one candidate, 43,163 for another, and 7,510 for a third; although the first candidate obtained a majority of all the votes, the second candidate was by the Fifth District Congressional Committee certified to the State Democratic Executive Committee as the nominee because that candidate had received a plurality of the votes in DeKalb County and in Rockdale County, while the other candidate had carried only Fulton County, which had a greater population and cast more votes than the other two counties combined; this certification was based on a rule of the State Executive Committee promulgated to govern the primaries as follows: "Rule VIII. In so far as the primary relates to the nomination of candidates for Congress from the various Congressional Districts, such candidates shall be voted for only in the Counties comprising their respective districts; and the Congressional Democratic Committee of each district shall determine whether the county unit or popular

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vote plan shall prevail"; and the Fifth Congressional Committee adopted a rule that "the candidate receiving the highest number of popular votes in any given County in said district shall be considered to have carried such County and be entitled to the full vote of such County on the county unit basis, that is to say, two votes for each representative to which such County is entitled in the lower House of the General Assembly." This rule is alleged to have the force and effect of law under the Georgia primary election statutes, Georgia Code of 1933, Sects. 34-3212 to 3217, as modified by Acts of 1944, extra session, pp. 2 & 4, and operates as a denial by the State of the equal protection of the law to the voters of Fulton County because their votes are severally given only a fraction of the effect given the votes in Rockdale County, which has two unit votes against six each for DeKalb and Fulton Counties, all in violation of the Fourteenth Amendment to the Constitution of the United States. The prayer is that the county unit rule, and the statute permitting its use, be declared unconstitutional and void, and the the rule promulgated by the Fifty District Congressional Committee be declared unconstitutional and void, and that the Executive Committee be enjoined from certifying to the Secretary of State any other nominee than the one who received the majority of the popular votes, and that the Secretary of State be enjoined from placing any other name as Democratic nominee on the general election ballot.

The Secretary of State moved to dismiss the complaint as to him because in effect against the State, and because the State is an indispensable party and cannot be enjoined without its consent. The other defendants also moved to dismiss because the matter is not of equitable cognizance but relates only to political matters, and that redress, if any is due, must be sought from the political and legislative departments of the State and United States; and because the House of Representatives is the constitutional judge of the election of its members. The answer further set up that voluntary participation in the primary estops the plaintiff from attacking its rules after it was over, and after the date at which candidates were required to qualify as such by Georgia law. It set up, too, that on a contest

the Contest Committee of the Democratic Executive Committee had decided that both the leading candidates should be certified to the Secretary of State as the Democratic nominees and this had in fact been done. The answer denied that the State law imposed the county unit rule on congressional primaries, which in this respect were purely party matters. It was alleged that there was confusion as to who rightly constituted the Fifth District Congressional Committee, and this was the reason for deciding that boh names should go on the ballot as Democratic nominees; and that an appeal is now awaiting action of the State Democratic Convention in October; and that because of the confusion it is better to leave the matter alone. The Secretary of State has already distributed to the Ordinaries of the counties of the Fifth District to be printed forms of ballots bearing the names of both nominees. The use of the county unit system to give a voice to all parts of the State in the Legislature, and in conventions of the political parties throughout the country, for a long time, is alleged.

Findings of Facts

On the hearing the sworn pleadings of each side were offered as affidavits, and they being in no serious conflict the facts above stated are found to be true.

Conclusions of Law

We make no final rulings on motions to dismiss, but consider them on the question whether an interlocutory injunction should issue. The petition to intervene filed by Mrs. Helen Douglas Mankin, referred to above as the majority candidate, in which she seeks to get the whole proceedings dismissed, we deny as not being in subordination to the main case.

We think the case is controlled in principle by the decision on June 10, 1946, in Colegrove *v.* Green, — U. S. —, and that equity should grant no relief, but leave any redress that may be due for the inequalities complained of to the action of the State legislature, or of Congress.* We greatly doubt

* Congress may have the final say under Constitution, Art. I, Sect. 4.

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that the county unit rule here complained of can be said to be imposed on a congressional primary by the State at all, so as to bring the Fourteenth Amendment into operation. Ga. Code of 1933, Sect. 34-3217, is express that "Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nominations for Member of Congress." If the county unit be imposed in Congressional primaries it is by party action, not State action. But at last as matters now stand, the county unit rule is not being applied by anyone. The State Executive Committee has refused to apply it and has certified both candidates, and both are on the ballots which are being printed, and every Democrat is free to vote for his choice, and the popular vote will determine in the general election. The plaintiff and those he represents will get exactly what they claim they should have. The double certification is in effect a cancellation of the primary, as respects these two candidates. We cannot speculate on what the State Convention may do in October. At present we see nothing that ought to be enjoined, even if that remedy be available in such a case as this.

SAMUEL H. SIBLEY,
United States Circuit Judge;
LOUIE W. STRUM,
United States District Judge;
F. M. SCARLETT,
United States District Judge.

Filed in Clerk's Office August 26, 1946. F. L. Beers, Clerk, by C. A. McGrew, Deputy Clerk.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 531

EARL P. COOK, *Appellant*

vs.

BEN W. FORTSON, JR., *as the duly appointed, qualified, and acting Secretary of State of the State of Georgia;*

J. LON DUCKWORTH, *Chairman of the Democratic Executive Committee of the State of Georgia;*

GRACE CANNINGTON, *Secretary of the Democratic Executive Committee of the State of Georgia; and the*

DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA, *an unincorporated association,*

Appellees.

BRIEF OF APPELLANT OPPOSING MOTION OF APPELLEES TO DISMISS OR AFFIRM

To the Supreme Court of the United States:

In their combined Counter-jurisdictional Statement and Motion to Dismiss or Affirm, Appellees make four principal contentions, viz:

1. That the rights of Appellant, sought to be protected, are purely political, and not civil rights.
2. That the imposition of the "county unit" rule in the Democratic Congressional primary election of July 17, 1946, wherein Appellant was denied the right to have his vote counted as cast, was party action and not State action.
3. That the questions are not substantial.
4. That the action is, in effect, one against the State of Georgia, and the State has not consented to be sued.

In opposition to these contentions, counsel for Appellant show:

1. *The right of Appellant, to have his vote counted as cast, in a Congressional election, is a civil right and not a political right.*

Numerous actions at law to redress the deprivation of the right to vote, as a civil right, have been maintained.

The very statute which gives the District Courts jurisdiction of such actions, in law and in equity, to wit, U. S. C. A., Title 28, Sec. 41, Subsection 14, is headed: "*Suits to redress deprivation of civil rights.*"

THE SAME RIGHT IS NOT A CIVIL RIGHT IN LAW AND A POLITICAL RIGHT IN EQUITY.

The members of the Court are familiar with the line of decisions which have held that the right to vote in Congressional elections is secured by Article I, Section 2, of the Constitution, and is protected by the Fourteenth Amendment. Some of the cases so holding, and protecting that Constitutional right either in actions for damages or in criminal proceedings, are:

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EX PARTE SIEBOLD,
100 U. S. 371, 388;

EX PARTE YARBROUGH,
110 U. S. 651, 663;

WILEY v. SINKLER,
179 U. S. 58, 63;

U. S. v. MOSLEY,
238 U. S. 383;

NIXON v. HERNDON,
273 U. S. 536, 541;

NIXON v. CONDON,
286 U. S. 73;

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U. S. v. CLASSIC,
313 U. S. 299;

SMITH v. ALLWRIGHT,
321 U. S. 649;

U. S. v. SAYLOR,
322 U. S. 384.

The contention of Appellees here was urged in NIXON v. HERNDON, *supra*, and was disposed of summarily. Mr. Justice Holmes, for the Court, said:

> "The objection that the subject-matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and recovered for in a suit at law hardly has been doubted for over two hundred years, since ASHBY v. WHITE, 2 Ld. Raym. 938, 3 id. 320, and has been recognized by this Court. (cit.) . . ."

Appellant here alleges private damage, by virtue of the failure to count his vote. The right to have his vote counted

is as much protected by the Constitution as is his right to cast a vote.

U. S. v. CLASSIC, *supra;*

SMITH v. ALLWRIGHT, *supra;*

U. S. SAYLOR, *supra.*

He has been deprived of that Constitutional right, as the statute expresses it, "under color of . . . statute," and prays that the statute (and the regulations adopted by virtue of it), be declared to be unconstitutional and void.

Substantially the same relief is prayed in the instant case, to redress the deprivation of a civil right which has resulted in private damage, as was prayed and granted in the political case of

SMILEY v. HOLM,
285 U. S. 355.

In that case, the Court, through Mr. Chief Justice Hughes, described the proceeding as follows:

> "This suit was brought by the petitioner as a 'citizen, elector and taxpayer' of the State *to obtain a judgment declaring invalid all filings for nomination for the office of representative in Congress,* which should designate a subdivision of the State as a congressional district, *and to enjoin the Secretary of State from giving notice of the holding of elections* for that office in such subdivisions." (Emphasis ours.)

The judgment of the State court dismissing the action was reversed, and, in substance, this Court granted the declaratory judgment. And that case was decided before the enactment of the Declaratory Judgment statute.

Buttressed by the Declaratory Judgment Act, and asserting private damage resulting from the deprivation of a Constitutional right, Appellant in the case at bar is entitled to the relief sought.

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See, in this connection:

MITCHELL v. WRIGHT (C.C.A. 5),
154 F. (2d) 924.

II. *The imposition of the "county unit" rule in the Democratic Congressional primary election of July 17, 1946, wherein Appellant was denied the right to have his vote counted as cast, was State action.*

(a) *The State of Georgia requires a primary for the nomination of candidates for members of Congress:*

Code of Georgia, 1933, Sec. 34-3217:

> "Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nominations for members of Congress, judges of the superior courts, solicitors general, members of the General Assembly and county officers; and this law shall not be construed to require a primary for any of the last-named officials, *except in their respective districts,* circuits, or counties, as provided by law. . . ." (Emphasis ours).

(b) *The laws of Georgia do not require any definite unit of election (i.e., whether by popular or "county unit" votes) in primary elections for nomination of candidates for member of Congress, but do require that the political party authorities shall, in all matters not provided for by law, make rules and regulations for holding all primary elections and for making returns thereof.*

Code of Georgia of 1933:

> Sec. 34-3217: "Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nominations for members of Congress . . ."
>
> Sec. 34-3209: "The party authorities *shall,* in all matters not provided for in this Chapter, formulate rules and regulations for holding said primary election and for making returns thereof to the proper party authorities." (Emphasis ours.)

The direction that the "party authorities," not the "party,"

shall make such rules and regulations, is significant. It brings the case squarely within the doctrine of

NIXON v. CONDON,
286 U. S. 73.

The State Democratic Executive Committee failed to exercise the power and duty to fix a unit of election in Congressional primaries, providing, in its rule under which the instant primary was held, as follows:

"VIII.

"Insofar as the Primary relates to the nomination of candidates for Congress from various Congressional Districts, such candidates shall be voted for only in the counties comprising their respective districts; and the Congressional Democratic Committee of each District shall determine whether the county unit or popular vote plan shall prevail."

Whereupon, by resolution (Record, p. 4) the Congressional Democratic Committee for the Fifth Congressional District provided that the "county unit" rule should prevail in the Congressional primary election held July 17, 1946.

The exclusion of Appellant from full participation in said primary, by refusing to count his vote as cast, was State action by the Fifth District Democratic Congressional Committee.

NIXON v. CONDON, *supra*, at page 85:

"Whatever power of exclusion has been exercised by the members of the committee has come to them, therefore, not as delegates of the party, but as delegates of the State. . . . Power so intrenched is statutory, not inherent. If the State had not conferred it, there would be hardly a color of right to give a basis for its exercise."

In imposing the "county unit" rule in the primary under consideration, the Fifth Congressional Committee acted independently of the will of the Democratic State Convention, independently of the will of the State Democratic Executive

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Committee (see Rule VIII, *supra*), and acted, both in law and in fact, as an agency of the State.

NIXON v. CONDON, *supra*, at page 88:

> "The pith of the matter is simply this: that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established and continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere. They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly. . . . The test is not whether the members of the Executive Committee are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action."

And see:

U. S. v. CLASSIC, *supra;*

SMITH v. ALLWRIGHT, *supra;*

CHAPMAN v. KING, 154 F. (2d) 460—(C.C.A. 5).

III. *The questions are substantial.*

Not only does Appellant seek relief in his own behalf, but also in behalf of 53,882 electors who voted, as he did, for candidate Helen Douglas Mankin, who received both a plu-

rality and a majority of all votes cast. If mathematics is an aid to a determination of the substantiality of the questions, the case is 53,882 times as important as, for example, was the case of NIXON v. CONDON, supra.

The following excerpt from COLEMAN v. MILLER is apt:

> "Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. Petitioners come directly within the provisions of the statute governing our appellate jurisdiction. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege."

This Court has so frequently concerned itself with protecting the right of individuals to vote and to have their vote counted and given effect, that it is inconceivable that the questions here raised may be considered not substantial.

IV. *The action is not against the State of Georgia.*

In PHILADELPHIA CO. v. STIMSON,
223 U. S. 605,

a case challenging the authority of the Secretary of War to do the acts complained of therein, the Court said, at page 620:

> ". . . in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments." (Citing numerous authorities.)

See also:

SMILEY v. HOLM, *supra.*

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Appellant respectfully submits that the motion to dismiss or affirm filed by Appellees should be denied on all grounds and that this Honorable Court should accept and note jurisdiction of this appeal.

Respectfully submitted,

ALEX. W. SMITH

CROOM PARTRIDGE

Counsel for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 531

EARL P. COOK, *Appellant-Petitioner*

vs.

BEN W. FORTSON, JR., *as the duly appointed, qualified, and acting Secretary of State of the State of Georgia;*

J. LON DUCKWORTH, *Chairman of the Democratic Executive Committee of the State of Georgia;*

GRACE CANNINGTON, *Secretary of the Democratic Executive Committee of the State of Georgia; and the*

DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA, *an unincorporated association,*

Appellees-Respondents.

NOTE: There being no printed Record before the Court to which counsel may refer, such references are omitted; in all other respects, counsel have endeavored to comply with the rules of this Court.

THE OPINION OF THE COURT BELOW

The opinion of the Court below is not yet reported, but, together with its judgment, is set out as an Appendix to STATEMENT AS TO JURISDICTION filed by Appellant herein.

GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

I. The right of a duly qualified elector, a citizen of the United States, to vote for a Member of Congress, and to have his vote counted as cast, is secured by Article I, Section II, of the Constitution of the United States, as a private right.

II. Pursuant to power conferred upon the authorities of political parties by the State of Georgia by virtue of certain statutes, the State of Georgia, acting through a Democratic political party committee for the Fifth Congressional District of Georgia, imposed the "county unit" method of counting votes in a Democratic primary election for Member of Congress, held July 17, 1946. Said "county unit" system is designed arbitrarily to discriminate, and does so discriminate against Appellant and the members of his class.

III. By said State action, the vote of Appellant, a qualified elector, cast in said primary, was not counted as cast, but was counted only as a small fraction of a vote, contrary to Article I, Section II, of the Constitution of the United States and Amendment XIV thereto.

IV. Appellant brought his action for a Declaratory Judgment, to declare the aforementioned statutes of the State of Georgia to be unconstitutional, and the party rule imposing the "county unit" system in said election, to have the force of law and to be unconstitutional and void for the reasons above asserted, and for injunctive relief. The relief prayed was denied. (For details of rulings made, see *Specifications of Error, infra.*)

V. The statutory provisions under which jurisdiction is invoked are as follows:

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The Supreme Court of the United States has jurisdiction of this cause upon appeal by virtue of the fact that it is a direct appeal under Sec. 266 of the Judicial Code as amended (U.S.C.A., Title 28, Sec. 380), and allowed under Sec. 238 of the Judicial Code as amended (U.S.C.A., Title 28, Sec. 345). The complaint was brought under the provisions of U.S.C.A., Title 28, Sec. 41, sub-sec. 14, and the prayers are for a Declaratory Judgment and for further relief by way of a writ of injunction, pursuant to Judicial Code, Sec. 274d (U.S.C.A., Title 28, Sec. 400).

VI. A few of the cases believed to sustain the jurisdiction of this honorable Court are:

WILEY v. SINKLER, 179 U.S. 58, 63;

NIXON v. CONDON, 286 U.S. 73;

COLEGROVE v. GREEN, 90 L. ed. 1212.

STATEMENT OF THE CASE

Earl P. Cook, as a qualified voter, brought his action against Ben W. Fortson, Jr., as Secretary of State of Georgia; J. Lon Duckworth, Chairman of the Democratic Executive Committee of the State of Georgia; Grace Cannington, Secretary of said Committee, and said Committee, for a Declaratory Judgment, and for additional relief by injunction, alleging that the rules of the said Democratic Executive Committee and of the Fifth District Congressional Democratic Committee imposed the "county unit rule" of election in a Democratic Congressional Primary held July 17, 1946; that said rules constituted a part of the election system under the laws of the State of Georgia, and had the force of law, and praying the Court to declare said rules, and the statutes requiring or permitting the same, to be utterly unconstitutional and void, and to enjoin the defendants from certifying as the winner in said Primary any candidate save the candidate who received the plurality and majority of all votes cast therein, for that said statutes and rules abridged the right and privilege of Appellant, and of each member of his class, to vote in said Congressional primary election, for a candidate for Member of Congress, upon substantially an equal basis with each other elector in said Congressional District, for that the said "county unit rule" discriminates, arbitrarily, against the electors of Fulton County, in said District. Appellant alleged that his right to cast an entire vote, and to have that vote counted, is secured to him and to the members of his class by Article I, Section 2, of the Constitution of the United States and guaranteed against abridgment or discrimination by Amendment XIV thereto.

Appellant alleged, in substance, that the State of Georgia, by statute, delegated to the Democratic Party authorities, the option and discretion to provide whether a primary election of said party should be held under the popular vote rule or under the "county unit" rule, and that, in imposing the "county unit" rule in the Congressional primary above mentioned, the Congressional Democratic Committee intended to and did exercise the discretion and option vested in it by law.

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The "county unit rule," required by statute to be applied in primaries for many offices, and authorized by statute to be applied in Congressional primaries, is stated in the Code of Georgia, 1933 (Sec. 34-3212), as follows:

> "Candidates for nominations . . . who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of such county on the county unit basis, that is to say, two votes for each representative to which such county is entitled in the lower House of the General Assembly. . . ."

As illustrating and demonstrating the discrimination against himself and members of his class resulting from the application of the "county unit rule" in the aforementioned Congressional primary, Appellant set out the following summary of statistics relative to the three counties comprising the Fifth Congressional District of Georgia:

County	Population (1940 Census)	Number of State Representatives	Number of County Unit Votes
Fulton	392,886	3	6
DeKalb	86,648	3	6
Rockdale	7,724	1	2

Appellant alleged that, under the "county unit rule," as applied to three said counties upon the basis of comparative populations, each elector of Rockdale County was entitled to one full vote, while each elector of DeKalb County was entitled to .2667 of a vote, and each elector of Fulton County was entitled to only .0589 of a vote.

Appellant showed to the specially constituted three-judge court that he voted in said primary election for Helen Douglas Mankin, who received both a plurality and a majority of all votes cast therein, and showed the consolidated vote in said primary to have been as follows:

	Popular Vote	Unit Vote	Number Counties
James C. Davis	43,162	8	2
Capt. Wyman C. Lowe	7,510	0	0
Helen Douglas Mankin	53,882	6	1

He showed that, notwithstanding the election of Helen Douglas Mankin by popular vote, the authorities of the Democratic Party and the Secretary of State threatened to place upon the official ballot for use in the General Election to be held November 5, 1946, as a candidate of said party, the name of James C. Davis, who received only 43,162 of the 104,554 popular votes cast in said primary election, but who nevertheless received eight of the fourteen "county unit" votes provided by the rules of the Congressional Democratic Committee under authority of law.

Upon the trial and hearing of said cause, it was shown that the names of both Helen Douglas Mankin and of James C. Davis had been, by the authorities of the Democratic Party, certified to the Secretary of State as candidates of said Party, and that, *pendente lite* (and within four days prior to the date set for the hearing), the Secretary of State had so certified both names to the Ordinaries of the counties comprising the Fifth Congressional District. (NOTE: It is the duty of said Ordinaries to place on the official ballot for the General Election the names of candidates certified to them by the Secretary of State.) [Code § 40-601 as amended by Acts 1946 (see appendix).]

Notwithstanding such certification, James C. Davis entered an appeal to the State Convention of the Democratic Party, held October 9, 1946, from the aforementioned certification by the authorities of the Party to the Secretary of State, and the said Convention has declared that Mrs. Mankin is not a candidate of the Democratic Party, and her name has been removed from the ballot, despite the fact that she received a majority and plurality of the popular votes cast in the primary.

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The three-judge District Court held in substance that the case was controlled by the decision of this Court in COLEGROVE v. GREEN, 90 L. ed. 1212, that the issues presented in the instant case were of a political nature, and therefore not proper for judicial determination. Injunctive relief was denied.

SPECIFICATION OF ERRORS

1. Error is specified on the failure of the District Court to grant a Declaratory Judgment, as prayed. (Assignments of Error, I.)

2. Error is specified on the failure and refusal of the District Court to issue and grant an interlocutory injunction, as prayed. (Assignments of Error, II.)

3. Error is specified on the failure of the District Court to hold and adjudge that the rules of the Democratic Party pointed out in the Complaint, are a part of the election machinery of the State of Georgia, and have the force of law. (Assignments of Error, V.)

4. Error is specified on the failure of the District Court to hold that the right to vote for a Member of Congress is a right and privilege secured to Appellant by Article I, Section II, of the Constitution of the United States, and guaranteed against infringement and discrimination by Amendment XIV thereto. (Assignments of Error, VI.)

5. Error is specified upon the failure of the District Court to hold and adjudge that the laws of the State of Georgia, and the rules of the Democratic Party providing for a primary election under the county unit rule, complained of herein, abridge the privilege of Appellant to vote for a Member of Congress, and that they deny to Appellant the equal protection of the laws, in violation of the Fourteenth Amendment. (Assignments of Error, VII.)

6. Error is specified on the failure of the District Court to hold and adjudge that Appellant, under and by virtue of Article I, Section II, of the Constitution of the United States, and Amendment XIV thereto, had the right to vote in the

Democratic primary election held July 17, 1946, and to have his vote counted, on a substantially equal basis with the vote of every other qualified elector voting in said election within the Fifth Congressional District of Georgia. (Assignments of Error, VIII.)

7. Error is specified on the finding and decision of the District Court, as a Conclusion of Law, that:

> "We think the case is controlled in principle by the decision on June 10, 1946, in Colegrove v. Green, 90 L. ed. 1212, and that equity should grant no relief, but leave any redress that may be due for the inequalities complained of to the action of the State Legislature, or of Congress."
> (Assignments of Error, IX.)

8. Error is specified on the finding and decision of the District Court, as a conclusion of law, the following:

> "We greatly doubt that the county unit rule here complained of can be said to be imposed on a congressional primary by the State at all, so as to bring the Fourteenth Amendment into operation."
> (Assignments of Error, X.)

9. Error is specified on the finding and decision of the District Court, as a conclusion of law, the following:

> "If the county unit be imposed in congressional primaries it is by party action, not state action."

10. Error is specified on the finding and decision of the District Court, as a conclusion of law, as follows:

> "But at last as matters now stand, the county unit rule is not being applied by anyone. The State Executive Committee has refused to apply it and has certified both candidates, and both are on the ballots which are being printed, and every Democrat is free to vote for his choice, and the popular vote will determine in the general election. The plaintiff and those he represents will get exactly what they claim they should have."
> (Assignments of Error, XII.)

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11. Error is specified on the finding and decision of the District Court, as a conclusion of law, as follows:

> "At present we see nothing that ought to be enjoined, even if that remedy be available in such a case as this." (Assignments of Error, XIII.)

SUMMARY OF THE ARGUMENT

Points I, II: The District Court had jurisdiction, and the Supreme Court of the United States has jurisdiction on appeal, of this cause.

Points III, IV: The right to vote for Members of Congress is secured to qualified electors by Article I, Section II, of the Constitution of the United States, is guaranteed against infringement or discrimination by Amendment XIV, and is a personal right.

Points V, VI: By law, the State of Georgia requires a primary election in each Congressional District for nominating candidates for Members of Congress, but does not provide for any definite unit of election therein (i.e., whether by popular or "county unit" votes).

Point VII: By law, the State of Georgia requires that the political party authorities shall, in all matters not provided by law, make rules and regulations for holding all primary elections and for making returns thereof.

Points VIII, IX: No higher authority of the Democratic Party having exercised the right delegated by the State to fix a definite unit of election for the Congressional primary election held July 17, 1946, the Congressional Democratic Committee for the Fifth Congressional District provided that the "county unit rule" should prevail therein.

Point X: The adoption of the "county unit rule" in said election by said Committee, in the exercise of power delegated by the State, and required by statute to be exercised, was State action, had the force of law, and abridged Appellant's right to vote for a Member of Congress, secured by Article I, Section II, of the Constitution.

Point XI: By adopting the "county unit rule" for said election, a committee of eighteen thwarted the will and choice of a plurality and a majority of the electors of said Congressional District.

Point XII: The State of Georgia supervises, and collab-

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orates in, the holding of all primary elections, and has adopted the party primary as a part of the public election machinery.

Point XIII: The holding of said Congressional primary election was the action of the State of Georgia, acting through the Congressional Democratic Committee for said District.

Point XIV: The "county unit rule" is designed arbitrarily to discriminate, and by virtue thereof the State of Georgia and the Democratic Party do so discriminate, against the electors of Fulton County, in favor of the electors of Rockdale County and of DeKalb County.

Points XV, XVI: Such discrimination deprives Appellant of the right to vote and to have his vote counted on substantially an equal basis with electors of other counties in said Congressional District, is a private wrong to Appellant, and is in violation of both the "privileges and immunities" clause, and the "equal protection" clause, of the Fourteenth Amendment.

Points XVII-XIX: The District Court had the right and duty to grant Appellant a Declaratory Judgment, and injunctive relief, as prayed.

1. *The District Court had jurisdiction of the parties and of the subject-matter in this cause.*

Plaintiff asserted a right to vote for a Member of Congress, and to have his vote counted upon a basis of substantial equality with every other vote cast in his Congressional District. Such right, he alleged to be secured to him by the Constitution of the United States (Article I, Section II), and to be guaranteed by Amendment XIV thereto.

The Constitution provides:

Article III:

> "Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *

"Section 2. The judicial Power shall extend to all Cases, in law and equity, arising under this Constitution, * * *"

The complaint was brought under the provisions of U.S. C.A., Title 28, Sec. 41, sub-section 14, to redress the deprivation of civil rights.

The relief sought was that authorized by Judicial Code, Sec. 274d (U.S.C.A., Title 28, Sec. 400), to wit, a Declaratory Judgment and further relief by way of a writ of injunction, both temporary and permanent.

Injunction being sought to restrain the operation of State statutes upon the ground of the unconstitutionality thereof, a three-judge District Court was convoked, in conformity with Judicial Code, Section 266, as amended (U.S.C.A., Title 28, Sec. 380), one of said Judges being the Senior Circuit Judge for the Fifth Circuit. The required notice was given to the Governor and to the Attorney-General of the State of Georgia.

II. *The Supreme Court of the United States has jurisdiction in this cause on this appeal.*

An interlocutory injunction having been denied, after notice and hearing, the Supreme Court has jurisdiction of this cause on this appeal by virtue of

Judicial Code, Sec. 266, as amended (U.S.C.A., Title 28, Sec. 380);

Judicial Code, Sec. 238, as amended (U.S.C.A., Title 28, Sec. 345);

(See appendix for pertinent quotations.)

And see:

WILEY v. SINKLER, 179 U.S. 58, 65;

NIXON v. CONDON, 286 U.S. 73;

COLEGROVE v. GREEN, 90 L. ed. 1212.

III. *The right to vote for Members of Congress is conferred by Article I, Section II, of the Constitution of the United*

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States, upon citizens of the United States, who are qualified, according to State law, to vote for the popular branch of their State legislature.

Article I, Section 2:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature."

In EX PARTE YARBROUGH, 110 U.S. 651, it was decided that the Constitution adopts the State qualification as the federal qualification for the voter; but that his right to vote is based upon the Constitution and not upon the State law. Interestingly enough, EX PARTE YARBROUGH was an original proceeding to inquire into the jurisdiction of the United States Circuit Court for the Northern District of Georgia, the District from which this appeal is brought. In that case, this Court, in a unanimous opinion delivered by Mr. Justice Miller, said:

> "But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States.
>
> "The office, if it be properly called an office, is created by that Constitution and by that alone. It also declares how it shall be filled, namely, by election. Its language is: (Quoting Article I, Section 2.)
>
> "The States, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualifications for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

> "It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State."

The Court cited an earlier case, in which had been discussed the mutual interests of both the State and National governments in the proper election of members of Congress, viz:

EX PARTE SIEBOLD, 100 U.S. 371.

The doctrine of EX PARTE YARBROUGH, supra, was adhered to in

WILEY v. SINKLER, 179 U.S. 58, 62,

where the Court prefaces the same language as is above-quoted from the Yarbrough Case with the following statement:

> "The right to vote for members of the Congress of the United States is not derived merely from the Constitution and laws of the State in which they are chosen, but has its foundation in the Constitution of the United States."

Again, in the recent case of

UNITED STATES v. CLASSIC, 313 U.S. 290,

this Court has followed the ruling in EX PARTE YARBROUGH, *supra*, and the following language, appearing at page 314, is apt:

> "Interference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus, as a matter of law and in fact, an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district. The primary in Louisiana is an integral part of the proce-

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dure for the popular choice of Congressman. The right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice.

"We then come to the question whether that right is one secured by the Constitution. Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right."

More recently, EX PARTE YARBROUGH, *supra*, and the CLASSIC CASE, *supra*, have been followed, in

SMITH v. ALLWRIGHT, 321 U.S. 649, 661:

"It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution."

IV. *The right to vote for Members of Congress, secured by the Constitution, is guaranteed against abridgment or discrimination by Amendment XIV to the Federal Constitution. It is a personal right.*

The language of Mr. Justice Holmes, in a unanimous decision in

NIXON v. HERNDON, 273 U.S. 536, 540,

is apposite, and seems to settle the matter. Of a statute of the State of Texas, forbidding negroes to take part in a Democratic primary election in that State, the Court said:

"The important question is whether the statute can be sustained. But although we state it as a question the

answer does not seem to us open to a doubt. We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them. (cit.) That Amendment 'not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws. . . . What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States . . .?' "

See also:

NIXON v. CONDON, 286 U.S. 73, at 89.

V. *The laws of Georgia require a primary election in the several Congressional Districts of the State, for the nomination of candidates for Members of Congress.*

Code of Georgia of 1933, Sec. 34-3217:

"Limitations.—Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nomination for members of Congress, judges of the superior courts, solicitors general, members of the General Assembly and county officers; and this law shall not be construed to require a primary for any of the last-named officials, *except in their respective districts*, circuits or counties, as provided by law: Provided, however, that primaries for nomination of members of Congress, judges of the superior courts, solicitors general and members f the General Assembly shall be held on the date named in section 34-3212 for primaries for United States Senator, Governor, Statehouse officers, Justices of the Supreme Court and Judges of the Court of Appeals. (Acts 1917, p. 189.)" (Emphasis ours.)

VI, VII. The laws of Georgia do not require any definite

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unit of election (i.e., whether by popular or "county unit" votes) in primary elections for nomination of candidates for member of Congress, but do require that the political party authorities shall, in all matters not provided for by law, make rules and regulations for holding all primary elections and for making returns thereof.

Code of Georgia of 1933 (dealing with the county unit vote law):

> "Sec. 34-3217. *Limitations.*—Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nominations for members of Congress, . . ."
>
> "Sec. 34-3209. *Party authorities may formulate additional rules.*—The party authorities *shall*, in all matters not provided for in this Chapter, formulate rules and regulations for holding said primary election and for making returns thereof to the property party authorities." (Emphasis ours.)

Necessarily, in using the phrase "party authorities," the General Assembly of Georgia intended to confer upon some officers or agency of the Party, rather than upon the Party Convention itself exclusively, the power and duty to formulate rules and regulations governing the holding of primary elections. As will be shown, the State Democratic Executive Committee so construed the statute. (See the following subdivision.)

That this was a delegation of power to the party authorities is demonstrated in

NIXON v. CONDON, 286 U.S. 73, q.v.

VIII. *Insofar as concerns the Congressional primary election here under attack, neither the officers of the State Democratic Party, nor the State Democratic Executive Committee, nor any other higher authority of said Party exercised the power, delegated by the State to fix a definite unit of election therein, but the State Executive Committee left the exercise of that power and duty to the respective Congressional Democratic Committee in each District.*

We quote from the rules and regulations of the State Democratic Executive Committee of Georgia, adopted May 2, 1946, under which this primary election was held:

"VIII.

"Insofar as the Primary relates to the nomination of candidates for Congress from various Congressional Districts, such candidates shall be voted for only in the counties comprising their respective districts; and the Congressional Democratic Committee of each District shall determine whether the county unit or popular vote plan shall prevail."

IX. *The Congressional Democratic Committee for the Fifth Congressional District, by resolution, provided that the "county unit rule" should prevail in the primary election held July 17, 1946.*

We quote from the resolution adopted by said Committee on May 3, 1946:

"4. A candidate receiving a plurality of the votes cast in a county shall be entitled to the unit vote for said county and the candidate receiving a majority of the county unit votes cast in said primary in said District shall name delegates from each County in the District to a convention of delegates to be held in the City of Atlanta, Georgia, on Saturday, July 27, 1946, at 11 o'clock A.M. in the Senate Chamber of the State Capitol. The delegates so appointed shall go to the convention and declare as the nominee the candidate who receives a majority of the County Unit votes cast in said primary.

"The number of delegates from each county shall be twice the number of representatives which said county has in the House of Representatives of Georgia.

"When said delegates have assembled in convention, they shall organize by the election of such officers as such convention may deem necessary and shall then proceed to declare as the nominee for Congress from the Fifth Congressional District the candidate receiving the majority of the County Unit votes cast in the primary."

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X. *Said resolution by the Congressional Democratic Committee for the Fifth District, having been adopted in the exercise of power conferred by the State and required by statute to be exercised, is State action, has the force of law, and abridges the right to vote for Members of Congress, secured by Article I, Section 2, of the Constitution of the United States.*

In principle, the instant case is controlled by the decision in

NIXON v. CONDON, 286 U.S. 73.

There the Court had under consideration a statute of Texas which authorized the State Executive Committee of a political party to prescribe the requisites of party membership. Holding that such power is inherent in the State convention of a party, and not in any committee, the Court said:

> "Whatever power of exclusion has been exercised by the members of the committee has come to them, therefore, not as the delegates of the party, but as the delegates of the State. * * * Power so intrenched is statutory, not inherent. If the State had not conferred it, there would be hardly color of right to give a basis for its exercise." (286 U.S. 73, at 85.)

That the Fifth District Congressional Democratic Committee undertook, in the case at bar, to exclude Appellant and members of his class from casting an entire vote, instead of undertaking to exclude them from Party membership, does not distinguish this case from that of NIXON v. CONDON. Independent of the will of the Democratic State Convention, and expressly declared to be independent of the will of the State Executive Committee by Rule VIII thereof, *supra*, the Fifth District Congressional Committee of the Party acted, both in law and in fact, as an agency of the State.

Appellant's contention is summed up, clearly and succinctly, in NIXON v. CONDON, *supra*, at page 88:

> "The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. They

are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere. They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matter of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly. * * * The test is not whether the members of the Executive Committee are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action."

And see:

U. S. v. CLASSIC, *supra;*

SMITH v. ALLWRIGHT, *supra.*

XI. *The said Congressional Democratic Committee for the Fifth District is composed of fourteen members and three officers; said Committee, by adopting the "county unit rule" for the Congressional Primary election held July 17, 1946, thwarted the will and choice of both a plurality and a majority of the electors of said Fifth Congressional District.*

The tremendous power vested in this little oligarchy of seventeen is delineated graphically by the returns. Here follows the consolidated vote in the Democratic primary presently under attack:

FROM THE FIFTH CONGRESSIONAL DISTRICT

	Popular Vote	Unit Vote	Number Counties
James C. Davis	43,162	8	2
Capt. Wyman C. Lowe	7,510	0	0
Helen Douglas Mankin	53,882	6	3
	104,554	14	3

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Having received both a plurality and a majority of all votes cast, Mrs. Mankin, nevertheless, received the unit vote only of Fulton County. Notwithstanding that 53,882 electors of 104,554 voting, chose Mrs. Mankin as *the* nominee of the Democratic Party for Member of Congress from the Fifth District, James C. Davis, under the "county unit rule," received the nomination. *Quod Erat Demonstrandum.*

It was only as a matter of grace, and because of a violation by the Congressional Committee of a rule of the State Executive Committee, that a Contest Committee certified Mrs. Mankin's name as a candidate, along with the name of James C. Davis. Appellees herein contend that such certification was not final, since the Democratic State Convention held October 9, 1946, declared that Mrs. Mankin was not a nominee, and to remove her name from the ballot.

XII. *The State of Georgia supervises, and collaborates in, the holding of all primary elections, and has adopted the party primary as a part of the public election machinery.*

The statutes of Georgia regulating primary elections have been considered by the Fifth Circuit Court of Appeals, and the decision of that Court coincides in most respects with the contentions of Appellant here. We refer to the case of

CHAPMAN v. KING, 154 F. (2d) 460.

In discussing the participation of the State in party primaries, the Court says:

> "But the State of Georgia has not left party primaries wholly to the various parties, but has recognized the practical potency of the party pledge and the great importance to the public of the results of a primary held by a numerous party, and has protected and regulated such primaries almost exactly in the same way as it has regulated elections by the people. Much, perhaps most, of this regulation we think in no wise commits the State to the party practices. . . .
>
> "But there are features of the Georgia laws which seem to us to show that the State, when any party calls

a primary, associates itself with the party in holding it, and adopts the result as authenticating the successful candidate to be the nominee of that party for the official election ballot. The State collaborates in these ways: It prohibits anyone to participate in any primary or convention of any political party who is not a qualified voter. Georgia Code § 2-608, Constitution, Art. II, Sec. I, Par. 8. The State furnishes its list of registered voters and these voters alone are declared entitled to vote in primaries as well as in general elections. Georgia Code § 34-405. And the State registrars are required to be at the court house during the voting hours of the primary as fixed by law § 34-2001a, to make corrections in the list, § 34-411 (Supplement). The State requires the party to select election managers, and requires each manager to take an oath that he will fairly and impartially and honestly conduct the election according to the provisions of law. § 34-3201. If a voter is challenged, they are required to administer to him an oath that he is duly qualified to vote '*according to the rules of the party*, and according to the election laws of this State.' § 34-3202. All the laws in reference to the qualification of voters and their registration are applied to primaries, and 'No person who is not a duly qualified and registered voter according to law and *who is not also duly qualified in accordance with the rules and regulations of the party holding the same*, shall be entitled to vote at any such primary election.' § 34-3218. If the challenged voter swears falsely, the State will punish him. § 34-9925. No one but a sworn manager can have any part in receiving or counting the votes. § 34-3205. The managers must turn over tally sheets, lists of voters, ballots and other election papers to the Clerk of the Superior Court to be kept under seal until the next grand jury meets if no contest is filed. § 34-3207. The managers are indictable for violation of their duty. §§ 34-9922, 34-9923. Generally all penal laws touching elections are extended to primaries, § 34-9933, Supplement; and § 34-9907.

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"Further, by the Act of 1917, Sections 34-3212 to 34-3218, the State has undertaken to control the method of determining who has been nominated in a primary for United States Senator, Governor, Statehouse officers and Justices of the Supreme Court and Court of Appeals, these being statewide elections, by saying that neither a majority nor a plurality of all votes cast shall nominate, but that a plurality of the votes in each county shall carry that county, and a majority of "county units" carried as therein defined, shall determine the nominee; and if no candidate carried a majority of the county units and there are but two candidates the one who received a majority of the popular votes shall be the nominee; but if there are more than two candidates and neither carried a majority of the county unit votes, there shall be a second primary between the two leading candidates whose result is to be determined on the same basis; with other elaborate provisions on further contingencies. This Act appears in large measure to take such primaries out of the control of the parties initiating them, and to substitute the State's will in determining the mode of choice of the party nominee. It is the Act which specifically declares that no one may vote who is not qualified according to the rules of the party. § 34-3218.

"We think these provisions show that the State, through the managers it requires, collaborates in the conduct of the primary, and puts its power behind the rules of the party. It adopts the primary as a part of the public election machinery. The exclusions of voters made by the party by the primary rules become exclusions enforced by the State and when these exclusions are prohibited by the Fifteenth Amendment because based on race or color, the persons making them effective violate under color of State law a right secured by the Constitution and laws of the United States within the meaning of the statute which is here sued on."

It should be borne in mind that the opinion from which the above excerpt is quoted was not written with particular

reference to election of a Member of Congress, and that, therefore, the Court probably overlooked Sec. 34-3217, above quoted, which does require a primary in each Congressional District. Nor did the Court comment upon the fact that the State empowers the party authorities to impose the "couny unit rule" in elections where it is not, by statute, required to be imposed.

See also:

NIXON v. CONDON, *supra;*

U. S. v. CLASSIC, *supra;*

SMITH v. ALLWRIGHT, *supra.*

XIII. *The holding of the Congressional primary election of July 17, 1946, in the Fifth Congressional District, was the action of the State of Georgia, by and through a committee of the Democratic Party, consisting of fifteen members and three officers.*

Counsel believe that this proposition has been demonstrated by the arguments and authorities under subdivisions X and XII, *supra.*

XIV. *The "county unit rule" is designed arbitrarily to discriminate, and by virtue thereof the State of Georgia and the Democratic Party, do so discriminate, against the citizen-electors of Fulton County, in favor of the citizen-electors of Rockdale County and of DeKalb County.*

The "county unit rule" imposed by statute in numerous primaries, and by the Fifth District Congressional Democratic Committee in the primary under attack (though different language was used in the latter case), is found in Code of Georgia, Sec. 34-3212, to wit:

> "Candidates for nominations to the above-named offices who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of such county on the county unit basis, that is to say, two votes for each representative to which such

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county is entitled in the lower House of the General Assembly. . . ."

This litigation does not attack, *per se*, the apportionment among the several counties of Georgia of representatives in the lower house of the legislature of that State. But, when, by statute, or under the authority of statute, the apporionment is made the basis of the "county unit rule," it must be scrutinized for discriminatory features. The apportionment statute presently effective is (Code of Georgia of 1933, 1945 Supplement, Sec. 47-101), to wit:

> "47-101. *House of Representatives; membership apportioned.*—The membership of the House of Representatives shall be as follows: Three members each from the counties of Fulton, Chatham, Bibb, Richmond, DeKalb, Muscogee, Floyd, Troup; two members each from the counties of Cobb, Carroll, Laurens, Thomas, Colquitt, Hall, Lowndes, Burke, Gwinnett, Sumter, Ware, Bulloch, Walker, Clarke, Bartow, Polk, Coweta, Washington, Emanuel, Decatur, Mitchell, Spalding, Baldwin, Meriwether, Coffee, Glynn, Upson, Whitfield, Worth, Dougherty; and one member each from each of the other counties of the State."

Even a superficial glance at the Census of 1940 reveals the fact that the apportionment among the larger Counties of representatives in the lower House of the General Assembly, is not "according to their respective numbers," but is purely arbitrary.:

Fulton County, with a population of 392,886, has 3 representatives.

Chatham County, with a population of 117,960, has 3 representatives.

Bibb County, with a population of 83,783, has 3 representatives.

Richmond County, with a population of 81,863, has 3 representatives.

DeKalb County, with a population of 86,942, has 3 representatives.

Muscogee County, with a population of 75,494, has 3 representatives.

Floyd County, with a population of 56,141, has 3 representatives.

Troup County, with a population of 43,879, has 3 representatives.

Troup County, with a population approximately one-ninth that of Fulton County, has equal representation with the latter county in the General Assembly, and an equal number of unit-votes in Statewide elections.

More directly, the picture for the Fifth Congressional District is as follows:

County	Population	Number of State Representatives	Number of County Unit Votes
Fulton	392,886	3	6
DeKalb	86,942	3	6
Rockdale	7,724	1	2

Upon the basis of population of the respective counties, therefore, while each qualified elector is entitled to one full vote, each qualified elector of DeKalb County is entitled to .2667 of a vote, but each qualified elector of Fulton County is entitled only to .0589 of a vote.

Can it be imagined that such gross discrimination is unintentional? Is a qualified elector, whose vote is deprived of .9411 of its weight and effectiveness, appreciably better off than a qualified elector who is denied his right to vote at all?

When the Constitution was adopted, slavery being an established institution, it was provided (Article I, Section 2, Par. 3) that, for the purpose of apportioning Representatives in Congress among the several states "according to their respective numbers," a slave should be considered as three-fifths of a free person; and yet, in the year of our Lord 1946, and in

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the year of our Independence the 171st, when a qualified voter of Fulton County, Georgia, comes to vote for such Representative, he is regarded as .0589 of an elector.

In these circumstances, the citizens of the small rural County of Rockdale may not truthfully say with "Mr. Dooley":

> "Ivrything that's worth havin' goes to th' city; th' counthry takes what's left."

XV. *This discrimination, contrary to Amendment XIV of the Federal Constitution, deprives Appellant of a personal right—the right to vote, and to have his vote counted, on substantially an equal basis with electors residing in other counties of said Congressional District, and is a private wrong to Appellant.*

The discriminatory features of the "county unit" system have been discussed in the preceding subdivision of this brief. That such discrimination is in contravention of the Fourteenth Amendment has already been demonstrated, IV, *supra.*

That the right of an elector to have his vote counted is included in his right to vote, is a proposition sustained both by reason and by the authorities.

In UNITED STATES v. MOSLEY, 238 U.S. 383, 386, the Court say:

> "We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."

The last-cited case was quoted and followed in

UNITED STATES v. SAYLOR, 322 U.S. 384.

There, in discussing the *Mosley case*, the Court say:

> "The conclusion was that Sec. 19 protected personal rights of a citizen including the right to cast his ballot, and held that to refuse to count and return the vote as cast was as much an infringement of that personal right as to exclude the voter from the polling place. The case

affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted."

Exclusion from the polling place is a private wrong.

NIXON v. HERNDON, *supra.*

Again, in

UNITED STATES v. CLASSIC, *supra*, at page 315:

"Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution." (cit.)

See also:

SMITH v. ALLWRIGHT, *supra.*

Counsel submit that a system of counting ballots is not honest which deprives the ballots cast in one county in the District of a large percentage of their weight and effectiveness, while giving to ballots cast in another county in the same District full weight and effect.

As appears from the foregoing authorities, this is not a case like that of COLEGROVE v. GREEN, *supra*, where it was said:

"The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity."

The districting of the State of Georgia is not here attacked. If the Fifth Congressional District as now constituted is a gerrymander, then Appellant complains of a gerrymander within a gerrymander, which operates directly upon the individual elector. The wrong here complained of may be judicially corrected.

The case of

McPHERSON v. BLACKER, 146 U.S. 1,

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which is more similar to COLEGROVE v. GREEN, *supra*, than to the case at bar (and which dealt with the election of Presidential electors by districts), is authority here on the contention of Appellant as to discrimination within the Congressional District. At page 40, the Court said:

> "If presidential electors are appointed by the legislatures, no discrimination is made; *if they are elected in districts where each citizen has an equal right to vote the same as any other citizen, no discrimination is made. . . .*"

To the contention urged there, as here, that "the subject-matter of the controversy is not of judicial cognizance" because "political in their nature," the Court, at page 23, replied:

> "But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws, and its validity sustained."

XVI. *This discrimination against Appellant and the members of his class, by virtue of the "county unit rule" and the statutes of the State of Georgia, is in violation of both the "privileges and immunities" clause, and the "equal protection" clause, of the Fourteenth Amendment to the Federal Constitution.*

That the right to vote in a Congressional election is a "privilege," as that word is used in the "privileges and immunities" clause of the Fourteenth Amendment, is beyond question. It has been held by this Court to be a "personal right." The words "right" and privilege" are used in the Constitution and the Amendment as synonyms.

See:

SLAUGHTER HOUSE CASES, 16 Wall. 36, 77.

This right to vote has been protected as a "right or privilege."

EX PARTE YARBROUGH, *supra;*

NIXON v. HERNDON, *supra;*

UNITED STATES v. CLASSIC, *supra.*

That the "county unit rule" is in violation of the "equal protection" clause seems too clear for argument. As was said in

NIXON v. HERNDON, *supra,*

"States may do a good deal of classifying that it is difficult to believe rational, but there are limits . . ."

and counsel insist that the discrimination against electors residing in Fulton County exceeds all bounds of rationality. It is purely arbitrary.

Cf. GATES v. LONG, 113 S.W. (2d) 388,

where the Supreme Court of Tennessee struck down a "county unit" statute as being arbitrarily discriminatory, and unconstitutional.

The specious argument that the "county unit" system of counting votes follows the pattern established by the Constitution for the apportionment of Senators among the States, and that of the Electoral College, ignores the history of the Federal Convention and the *raison d'etre* of such Constitutional provisions.

It seems hardly necessary to remind the Court that the Delegates to the Convention represented Sovereign States, each jealous of its sovereignty. They were conscious of the thought, later expressed by John Randolph, that: "Asking one of the States to surrender part of her sovereignty is like asking a lady to surrender part of her chastity." The larger States contended for "a participation in the government, fully proportioned to their superior wealth and importance," while the smaller States insisted upon the degree of equality which they enjoyed under the Articles of Confederation.[1]

In this situation, and faced with the almost impossible task

[1] *The Records of the Federal Convention of 1787*, Farrand, Vol. III, p. 243, from *The Federalist*, (Madison).

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of reconciling these diverse interests and jealousies, the delegates at last brought forth a design for government so magnificent as to defy description, and arouse the awe and reverence of succeeding generations.

The whole plan and purpose of the equality of representation in the Senate, and of the Electoral College, is explained in a few words by James Madison, in a letter to Thomas Jefferson.

> "The Senate will represent the States in their political capacity; the other House will represent the people of the States in their individual capacy (*sic*). The former will be accountable to their constituents at moderate, the latter at short periods. The President also derives his appointment from the States, and is periodically accountable to them.[2]

Thus was the integrity of each State, as a polity, preserved by equality of representation in the Senate and equality of voice in the appointment of a President; the interests of the people were safeguarded by apportionment of Representatives among the several States, "according to their respective numbers."[3]

To compare to this sublime compromise, whereby the rights of all are secured, the invidious "county unit" system (which has injustice for its sole object, and which interposes an oligarchy between the electors and the choice of their representative in the councils of the Republic) is rank impertinence.

XVII. *The District Court had the right and duty to grant the plaintiff a Declaratory Judgment as prayed.*

A primary election was held, as alleged, to determine which of three candidates should be the sole candidate of the Democratic Party for Member of Congress from the Fifth

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[2] Farrand, *supra*, III, p. 134. And see *McPherson v. Blacker*, 146 U.S. 1, 27, *et seq.*

[3] Constitution, Art. I, Sec. 2, Par. 3; and see: *Authorship of the Constitution of the United States*, Senate Document No. 787, 62d Congress, 2d Session, at pages 54, 56.

Congressional District of Georgia. That such nomination is equivalent to election is a matter of general knowledge. One candidate, for whom Appellant voted, received both a plurality and a majority of all votes cast in said primary election. Under color of a statute of the State of Georgia which empowers the authorities of a political party to impose the "county unit" rule in Congressional elections, Appellant was deprived of his right to have his ballot counted as cast, and the candidate for whom he voted was not declared the sole nominee of said party for said position. Pursuant to the Declaratory Judgment statute, Appellant brought his suit to have declared unconstitutional said statute of the State of Georgia, as well as all rules and regulations adopted by the Democratic Party authorities imposing the "counti unit rule" under authority thereof, and to enjoin the placing on the ballot for the forthcoming general election the name of any candidate than the one who received the majority of votes cast in said primary. In short, the action was one by a qualified elector to protect his franchise.

The right to bring such action is recognized by statute (U.S.C.A., Title 8, Sec. 43), and jurisdiction to entertain the same is conferred expressly upon the District Courts (U.S. C.A., Title 28, Sec. 41, sub-sec. 14).

The language of the Court in

COLEMAN v. MILLER, 307 U.S. 433, 438,

is apposite:

> "Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think the senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. . . . They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege."

In the case at bar, Plaintiff-Appellant is the representative

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of 53,882 electors, whose votes "have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient" to nominate the candidate for whom they voted. Plaintiff-Appellant, for himself and the members of his class has "set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect," and the State, acting through the authorities of the Democratic Party, "has denied that right and privilege."

COLEMAN v. MILLER, *supra*,

was an action for mandamus, which, while it is classed as a legal remedy, is granted or withheld upon equitable principles.

EX PARTE SKINNER & EDDY CORP.,
265 U.S. 86, 96.

While, as held in

NIXON v. HERNDON, *supra*,

private damage caused by outright denial of the right to vote may be recovered for in a suit at law, it is submitted that no remedy at law is adequate to protect the rights of Appellant and those he represents.

The case of

SMILEY v. HOLM, 285 U.S. 355,

provides ample authority for the granting of equitable relief in cases of this character. Though brought before the enactment of the Federal Declaratory Judgment Act, it was, in substance, a proceeding for a declaratory judgment and injunctive relief. In support of his right to equitable relief, Appellant here alleges all that was alleged in SMILEY v. HOLM, *supra*, plus "private damage." In the latter case,

> "The bill sought to have all filings for nominations declared illegal"

and to enjoin the Secretary of State from acting under an allegedly void law.

In the case at bar, Appellant seeks to have declared unconstitutional certain statutes, and certain party rules and regulations adopted thereunder, and to enjoin the Secretary of State from acting under those void laws, as well as to have declared illegal the nomination of any candidate for Member of Congress except the one who received the majority of the votes cast in the nominating primary.

It is respectfully submitted that the laws and rules complained of are unconstitutional, and that it was the duty of the District Court so to declare.

XVIII, XIX. *The District Court had the right and duty to grant the plaintiff an interlocutory injunction as prayed, and to grant a permanent injunction as prayed.*

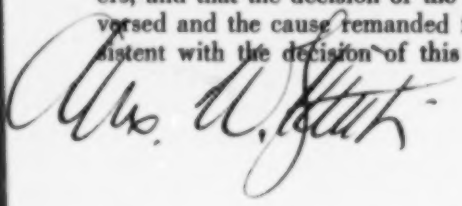
Upon the grounds urged in the preceding subdivision, and under authority of

SMILEY v. HOLM, *supra*,

it is respectfully insisted that the District Court was under the duty to grant injunctive relief as prayed.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that the decision of the District Court should be reversed and the cause remanded for further proceedings consistent with the decision of this Court.



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APPENDIX

Pertinent statutes of the State of Georgia. References are to Code of Georgia of 1933 (annotated), and to 1945 Pocket Part Supplements thereto:

Constitution of the State of Georgia as amended (Acts of 1945, page 8, et seq.):

ARTICLE II, SEC. I:

Paragraph I:

"Elections by the people shall be by ballot, and only those persons shall be allowed to vote who have been first registered in accordance with the requirements of law.

Paragraph II:

"Every citizen of this State who is a citizen of the United States, eighteen years old or upwards, not laboring under any of the disabilities named in this Article, and possessing the qualifications provided by it, shall be an elector and entitled to register and vote at any election by the people: Provided, that no soldier, sailor or marine in the military or naval services of the United States shall acquire the rights of an elector by reason of being stationed on duty in this State.

Paragraph III:

"To entitle a person to register and vote at any election by the people, he shall have resided in the State one year next preceding the election, and in the county in which he offers to vote six months next preceding the election.

Paragraph IV:

"Every citizen of this State shall be entitled to register as an elector, and to vote in all elections in said State,

who is not disqualified under the provisions of Section II of Article II of this Constitution, and who possesses the qualifications prescribed in Paragraphs II and III of this Section, or who will possess them at the date of the election occurring next after his registration, and who in addition thereto comes within either of the classes provided for in the two following subdivisions of this paragraph.

"1. All persons who are of good character and understand the duties and obligations of citizenship under a republican form of government; or,

"2. All persons who can correctly read in the English language any paragraph of the Constitution of the United States or of this State and correctly write the same in the English language when read to them by any one of the registrars, and all persons who solely because of physical disability are unable to comply with the above requirements but who can understand and give a reasonable interpretation of any paragraph of the Constitution of the United States or of this State that may be read to them by any one of the registrars."

Section VI, Paragraph I.

RETURNS MADE TO WHOM. Returns of election for all civil officers elected by the people, who are to be commissioned by the Governor, and also for members of the General Assembly, shall be made to the Secretary of State, unless otherwise provided by law.

ARTICLE III

Section III, Paragraph I.

NUMBER OF REPRESENTATIVES. The House of Representatives shall consist of representatives apportioned among the several counties of the State as follows:

To the eight counties having the largest population, three representatives each; to the thirty counties having the next largest population, two representatives each; and to the remaining counties, one representative each.

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Section IX, Paragraph II.

ELECTION, WHEN. The first election for members of the General Assembly, under this Constitution, shall take place on Tuesday after the first Monday in November, 1946, and subsequent elections biennially, on that day, until the day of election is changed by law.

* * * *

34-3201. (127) HOW ELECTIONS CONDUCTED; OATH OF MANAGERS. Every political primary election held by any political party, organization, or association, for the purpose of choosing or selecting candidates for office, or the election of delegates to conventions in this State, shall be presided over and conducted in the manner and form prescribed by the rules of the political party, organization, or association holding such primary elections, by managers selected in the manner prescribed by such rules. Such managers shall, before entering upon the discharge of their duties, each take and subscribe an oath that he "will fairly, impartially, and honestly conduct the same according to the provisions of the law providing how primary elections shall be held in this State, and in accordance with the laws of this State governing regular elections for the offices of this State." Should one or more of the managers thus appointed to hold such elections fail to appear on the day of election, the remaining manager or managers shall appoint others in their stead and administer to them the oath herein prescribed. The managers shall take the oath before a notary public or other officer authorized to administer oaths; but if no such officer can be conveniently had, the managers may administer the oath to each other. The oath, after being made and subscribed, shall be filed in the office of the clerk of the superior court of the county in which the primary election shall be held, within five days after an election. (Acts 1890-1, p. 210.)

34-3202. (128) EXHIBITION AND LOCKING OF BALLOT BOX; COUNT OF VOTES; CERTIFICATION OF RESULTS. Before any ballots are received at such primary elections, and immediately before opening the polls, the managers

shall open each ballot box to be used in the election, and shall exhibit the same publicly, to show that there are no ballots in the box. They shall then close and lock or seal the box, except the opening to receive the ballots, and shall not again open the same until the close of the election. They shall keep a list of voters voting at the election, and shall, before receiving any ballot, administer to the voter an oath, provided the voter's vote is challenged, that he is duly qualified to vote according to the rules of the party, and according to the election laws of this State, and that he has not voted before in such primary election then being held. At the close of the election the managers shall proceed publicly to count the votes and declare the result. They shall certify the result of the election, and transmit the certificate with the tally sheet or poll list, together with the ballots cast, and all other papers relating to such primary election, within the time and in the manner prescribed in this Chapter. (Acts 1890-1, p. 210.)

34-3203. (129) TIME FOR HOLDING ELECTION. Whenever any political party shall hold primary elections for nomination of candidates for office, such party or its authorities shall cause all candidates for nominations for Governor, Statehouse officers, members of Congress, United States Senators, judges of the superior courts, justices of the Supreme Court, judges of the Court of Appeals, solicitors general and members of the General Assembly to be voted for on one and the same day throughout the State at such date as may be fixed by the State executive committee of such party, except where a second primary shall have been called by the authorities of such party for any particular office on some subsequent day, through failure to make, for any cause, a valid nomination at the first primary, or in consequence of a contest; Provided, that said executive committee shall not fix the date for the said general primary earlier than 60 days before the date of the general State election in November: Provided further, that this section shall not have the effect of requiring a primary for judges and solicitors except in their respective circuits, or for members of the General Assembly except in their respective counties, or for State senators except in their counties, as the authorities of said party may authorize or direct. (Acts 1908, p. 55.)

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34-3204. (130) WHERE ELECTOR SHALL VOTE. No elector shall vote in any such primary election in a militia district other than the one in which he resides, or, if he resides in a city, in a ward other than the one in which he resides, if an election precinct shall be located in such ward. (Acts 1908, pp. 55, 56.)

34-3205. (131) OATH OF MANAGER, WHEN TO BE TAKEN. No person who has not first taken the oath prescribed by law for managers of primary elections shall act as manager, clerk, or assistant or in any way take part in receiving, counting, or consolidting the votes or results in any such primary election, and no manager of any primary election shall permit any person who has not first taken the oath now prescribed by law for the managers of primary elections, to act as assistant or clerk or in any way take part in receiving, counting, or consolidating the votes or results in any such primary election. (Acts 1908, pp. 55, 56.)

34-3206. (132) ELECTOR'S NAME MUST BE ON REGISTRATION LIST. No manager of any such primary election shall receive the ballot of any elector until he has first ascertained that the name of such elector appears upon the registration list furnished for such election by the registrars, or filed by them in the office of the clerk of the superior court of the county in which the primary election shall be held, and upon the receipt of such ballot the name of the elector voting shall be checked or marked on said list. (Acts 1908, pp. 55, 56.)

34-3207. (133) RETURNS OF MANAGERS, HOW FILED AND CONTROLLED. The returns of the managers, with the tally sheets, lists of voters, and ballots, together with all papers connected with said election, shall be filed in the office of the clerk of the superior court of the county in which said election shall be held, within four days after the final declaration of the result thereof. One of the lists of the voters and one of the registration lists with names of those checked or marked as voters shall be exhibited by said clerk to anyone desiring to inspect same, but the other documents deposited as aforesaid shall be kept unopened and under seal until the

next meeting of the grand jury, to which grand jury one registration list, one list of voters, and the checked registration list above mentioned shall be exhibited; and if no action shall be taken thereon by the grand jury and no contest shall have been filed within the time prescribed by the authorities of said party, all of said election papers shall be destroyed. (Acts 1890-1, p. 210; 1908, pp. 55.56.)

34-3208. (134) OFFICIAL BALLOT SHALL BE PROVIDED. The persons authorized by the rules of the party, organization, or association to hold such primary election shall provide an official ballot whereon shall be printed all the names of the candidates for the various offices hereinbefore named. (Acts 1908, pp. 55, 57.)

34-3209. (135) PARTY AUTHORITIES MAY FORMULATE ADDITIONAL RULES. The party authorities shall, in all matters not provided for in this Chapter, formulate rules and regulations for holding said primary election and for making returns thereof to the proper party authorities. (Acts 1908, pp. 55, 57.)

34-3210. (136) TIME AND PLACE OF ELECTION; RETURNS; DECLARATION OF RESULT. Every such primary election shall be held at the time and place, and under the regulations prescribed by the rules of the party, organization, or association holding the same, and the return shall be made and the result declared as prescribed in this Chapter. (Acts 1890-1, p. 210; 1900, p. 40; 1908, p. 56.)

34-3211. (137) CONTESTS. When a contest is filed on the ground of illegal votes, any of which it is claimed on affidavit can probably be proved to be illegal by resort to the ballots, specifying what ballots, it shall be the duty of the clerk of the superior court to deliver the same, together with all papers connected with said primary election, to the person or persons who shall preside at the taking of the testimony in such contested election, upon demand, who shall examine said suspected ballots and none other. (Acts 1900, pp. 40, 41.)

34-3212. COUNTY UNIT VOTE. Whenever any political party shall hold primary elections for nomination of candi-

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dates for United States Senator, Governor, Statehouse officers, justices of the Supreme Court, and judges of the Court of Appeals, such party or its authorities shall cause all candidates for nominations for said offices to be voted for on one and the same day throughout the State, which is hereby fixed as the second Wednesday in September of each year in which there is a regular general election. Candidates for nominations to the above-named offices who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of such county on the county unit basis, that is to say, two votes for each representative to which such county is entitled in the lower House of the General Assembly. If in any county any two or more candidates shall tie for the highest number of popular votes received, the county unit vote of such county shall be equally divided between the candidates so tying. All such county unit votes shall within 10 days after such primary be accurately consolidated by the chairman and secretary of the State committee of the political party holding such primary, and published in a newspaper published at the Capital, within three days after the completion of the consolidation, certified under the hands and seals of said chairman and secretary; and the candidates for said offices, respectively, who shall receive a majority of all the county unit votes, throughout the entire state, upon the basis above set forth, shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominee of such party for the above-named offices, respectively, and it shall be the duty of the State executive committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the names of all such successful candidates shall be placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidates shall be considered, deemed and held as the duly nominated candidates of such party for the offices named: Provided, that in the event there are only two candidates for any particular office referred to in this section, and it shall appear,

after the consolidation of all of the county unit votes throughout the State, that said candidates have received an equal number of county unit votes, the one who shall have received a majority of the popular votes shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominee of such party for such office; and it shall be the duty of the State executive committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the name of such successful candidate shall be placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidate shall be considered, deemed and held as the duly nominated candidate of such party for the office named: Provided, further, that if no convention of such party shall be called or held, the declaration of the result shall be made in such manner as may be prescribed by the State committee or other authority of such party. (Acts 1917, pp. 183, 184.)

* * * *

34-3216. EXPENSES; PAYMENT. The expense of holding such primary elections shall be paid by the political party which causes the same to be held. (Acts 1917, p. 189.)

34-3217. LIMITATIONS. Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nominations for members of Congress, judges of the superior courts, solicitors general, members of the General Assembly and county officers; and this law shall not be construed to require a primary for any of the last-named officials, except in their respective districts, circuits or counties, as provided by law: Provided, however, that primaries for nomination of members of Congress, judges of the superior courts, solicitors general and members of the General Assembly shall be held on the date named in section 34-3212 for primaries for United States Senator, Governor, Statehouse officers, justices of the Supreme Court and judges of the Court of Appeals. (Acts 1917, p. 189.)

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34-3218. LAWS OF FORCE. All the laws in reference to the qualification of voters and their registration shall apply to said elections, and no person who is not a duly qualified and registered voter according to law and who is not also duly qualified in accordance with the rules and regulations of the party holding the same, shall be entitled to vote at any such primary election. (Acts 1917, p. 189.)

34-3215a. CERTIFICATE OF RESULT OF ELECTION. Immediately after the consolidation of the votes in any such primary election a certificate showing the names of such candidates and the offices for which they are candidates, shall be filed in the office of the Secretary of State of this State; such certificate to be signed by the chairman and secretary of the State committee of the political party holding such primary. Said certificate shall show by counties the total number of popular votes and the county unit votes received by each candidate in any such primary election. (Acts 1943, p. 347.)

34-3223. RECOUNT OF BALLOTS: INTENT AND PURPOSE OF LAW. The legislative intent and purpose of this law is to effectuate fair and honest primary elections for the nomination of candidates for public office in this State. (Acts 1941, pp. 432, 433.)

34-3224. SAME, CANDIDATES AS TO WHOM LAW IS APPLICABLE. The provisions of this law shall apply to all primary elections hereafter held in this State by any political party for the purpose of nominating candidates for Governor, Statehouse officers, members of the General Assembly, members of Congress, judges of the superior courts, justices of the Supreme Court, judges of the Court of Appeals, solicitors general and county officers, and all such primary elections hereafter held for the nomination of any candidate for State, county, district or rational office required to be filled by election by the people of this State or any part thereof, whether such primary election be held to nominate candidates for unexpired terms or full terms. (Acts 1941, pp. 432, 433.)

(Here follow Sections 34-3225 through 34-3236, outlining recount procedure in detail.)

34-3608. TIME FOR FILING NOTICE OF CANDIDACY IN GENERAL ELECTION; TIME OF HOLDING PRIMARIES AND CONVENTIONS. In order to allow more adequate time for the participation of members of the military in elections and party primaries, the following provisions are enacted in lieu of those now provided by law:

1. All candidates for national and state offices, or the proper authorities of the political party nominating them, shall file notice of their candidacy, giving their names and the offices for which they are candidates, with the Secretary of State, at least 90 days prior to the regular election. All candidates for district and county offices either by themselves or by the proper authorities of the party nominating them, shall file notice of their candidacy with the ordinary of the county at least 90 days before the regular election.

2. Whenever any political party shall hold primary elections for nomination of candidates for office for Governor, Statehouse officers, members of Congress, United States Senators, judges of the superior courts, justices of the Supreme Court, judges of the Court of Appeals, solicitors general, and members of the General Assembly, which are by law voted on one and the same day throughout the State, said primary may be held on such date as may be fixed by the State executive committee of such party, and the State executive committee is authorized to fix such time for the said primary, second primary, or party convention as it may determine without respect to the time now provided by law as the date on which the said primary, second primary, or convention shall be held. (Acts 1944, Ex. Sess., pp. 2, 4.)

34-1904. BALLOTS IN ELECTION OTHER THAN PRIMARY ELECTIONS. In all elections other than primary elections held under the auspices of a political party, it shall be the duty of the ordinary to provide and furnish at the expense of the county, and in case of purely municipal elections, at the expense of the municipality, official ballots for all such elections, having printed thereon, in separate columns, the

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names of the candidates of each political party, designating the names of the political party to which they belong, and also the names of any other candidates for the offices to be filled at said election; and in case of election for President and Vice President of the United States, the names of the candidates for such offices may be added with the electors and party designation: Provided, however, it shall not be the duty of said officers to place the names of any candidates on said official ballots, unless notice of their candidacy shall be given in the following manner, to wit: All candidates for national and State offices, or the proper authorities of the political party nominating them, shall file notice of their candidacy, giving their names and the offices for which they are candidates, with the Secretary of State, at least 30 days prior to the regular election, except in cases where a second primary election is necessary: Provided, further, that such candidate shall also file a petition for that purpose signed by not less than five per cent. of the registered voters in that territory or that such political party shall have cast no less than five per cent. of the votes in the last general election next preceding for the election of such officer; but nothing in this proviso shall be construed as applying to special elections. The names of such candidates shall be filed with the Secretary of State as soon as possible after the determination of the result of said second primary. All candidates for district and county offices, either by themselves or by the proper authorities of the party nominating them, shall file notice of their candidacy with the ordinary of the county at least 15 days before the regular election, and all candidates for municipal offices shall file notice of their candidacy, either by themselves or by the proper authorities of the party nominating them, with the mayor or other chief executive officer of the municipality at least 15 days before the regular election. In the event of the resignation or death of any nominee of any political party prior to the regular election, at which the name of said nominee is to appear on the official ballot, said vacancy in nomination shall be filled in such manner as may be determined by the proper authorities of such party. Said officers shall also have printed on said ballots such language as may be necessary for the voters to express their desires as to any

question or matter which may be submitted at any such election. In all other particulars said ballots shall be arranged, printed, and prepared for regular elections as provided in section 34-1903. (Acts 1922, p. 100; 1943, p. 292.)

ACTS 1946 (approved Feb. 1, 1946), amending Code Section 40-601, par. 7.

Section 3. That in lieu of paragraph 7 of said Section 40-601 of the Code of Georgia of 1933 a new paragraph to be known as paragraph 7, is hereby enacted to read as follows: "The Secretary of State shall furnish each Ordinary of the State the form of official ballot, all blank forms, including tally sheets, blank lists of voters, forms of returns, certificates and directions to be used in all elections for United States Senate, Governor, electors of President and Vice-President of the United States, representatives to Congress, Secretary of State, State Treasurer, Comptroller General, Attorney General, State Superintendent of Schools, Supreme Court (Court) of Appeals, judges of the Superior Court, Solicitor General, Public Service Commission, Commissioner of Labor, members of the General Assembly, and county officers. The Secretary of State shall certify to the respective Ordinaries the names of all candidates for national and state offices who have qualified as such as provided in Section 34-1904 of the Code of Georgia and in case there are one or more persons purporting to represent the same political party or candidate it shall be the duty of the Secretary of State to determine such an issue. The Ordinaries of the respective counties shall not be required to add any other names for national and state offices on the official ballot except upon certificate of the Secretary of State.

CODE SECTION 34-2101. (94.) PROVISIONS GOVERNING ELECTIONS OF MEMBERS OF GENERAL ASSEMBLY APPLICABLE TO CERTAIN ELECTIONS IN CERTAIN PARTICULARS. Elections for Governor, Members of Congress, United States Senators, electors for President and Vice President, State Treasurer, Comptroller General, and Attorney General, shall be governed by the same rules as those governing the elections for members of the General Assembly, in the following particulars:

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1. Oaths to be taken by the voters.

2. Class of persons to hold the election and the oath to be taken by them.

3. Places and the time of day to hold them.

4. Manner of conducting and returning them, including all special elections, and in the duty of the clerks of the superior courts and the grand juries.

5. Several penalties attached to the managers or other persons.

6. Furnishing of blanks by the Governor.

7. In all other respects where applicable, and there is not a contrary provision of law.

CODE SECTION 34-1303 (9) (Pocket Part 1945).
MANNER OF CONDUCTING ELECTIONS

9. CONSOLIDATION AND RETURNS TO SECRETARY OF STATE. The managers to consolidate the vote of the county shall consist of all those who officiated at the county site, or a majority of them, and at least one from each precinct. They shall make and subscribe two certificates, stating the whole number of votes each person received in the county; one of them, together with one list of voters and one tally sheet from each place of holding the election, shall be sealed up and without delay mailed to the Secretary of State; the other, with like accompaniment, shall be directed to the clerk of the superior court of the county and be by him deposited in his office. After the clerk of the superior court has retaned same for the period required by law, he shall transmit same to the tax collector or tax commissioner, as the case may be, for his records. Each of said returns shall contain copies of the original oaths taken by the managers of the courthouse and precinct. (Acts 1921, p. 91; 1945, pp. 129, 135.)

U. S. C. A., TITLE 28, SEC. 345.

Section 345. (JUDICIAL CODE, SECTION 238.) APPELLATE JURISDICTION FROM DECREES OF UNITED STATES DISTRICT COURTS. A direct review by the Su-

preme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise:

(1) Section 29 of Title 15, and section 45 of Title 49.

(2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.

(3) Section 380 of this title.

(4) So much of sections 47 and 47a of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 217 of Title 7. (Mar. 3, 1911, c. 231, section 238, 36 Stat. 1157; Jan. 28, 1915, c. 22, section 2, 38 Stat. 804; Feb. 13, 1925, c. 229, section 1, 43 Stat. 938.)

U. S. C. A., TITLE 28, SEC. 380.

(JUDICIAL CODE, SECTION 266, AMENDED.) SAME; ALLEGED UNCONSTITUTIONALITY OF STATE STATUTES; APPEAL TO SUPREME COURT. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such applica-

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tion as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: PROVIDED, HOWEVER, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: PROVIDED, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to

the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit. (June 18, 1910, c. 309, Section 17, 36 Stat. 557; Mar. 3, 1911, c. 231, Section 266, 36 Stat. 1162; Mar. 4, 1913, c. 160, 37 Stat. 1013; Feb. 13, 1925, c. 229, Section 1, 43 Stat. 938.)

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 531

EARL P. COOK,

Appellant,

vs.

BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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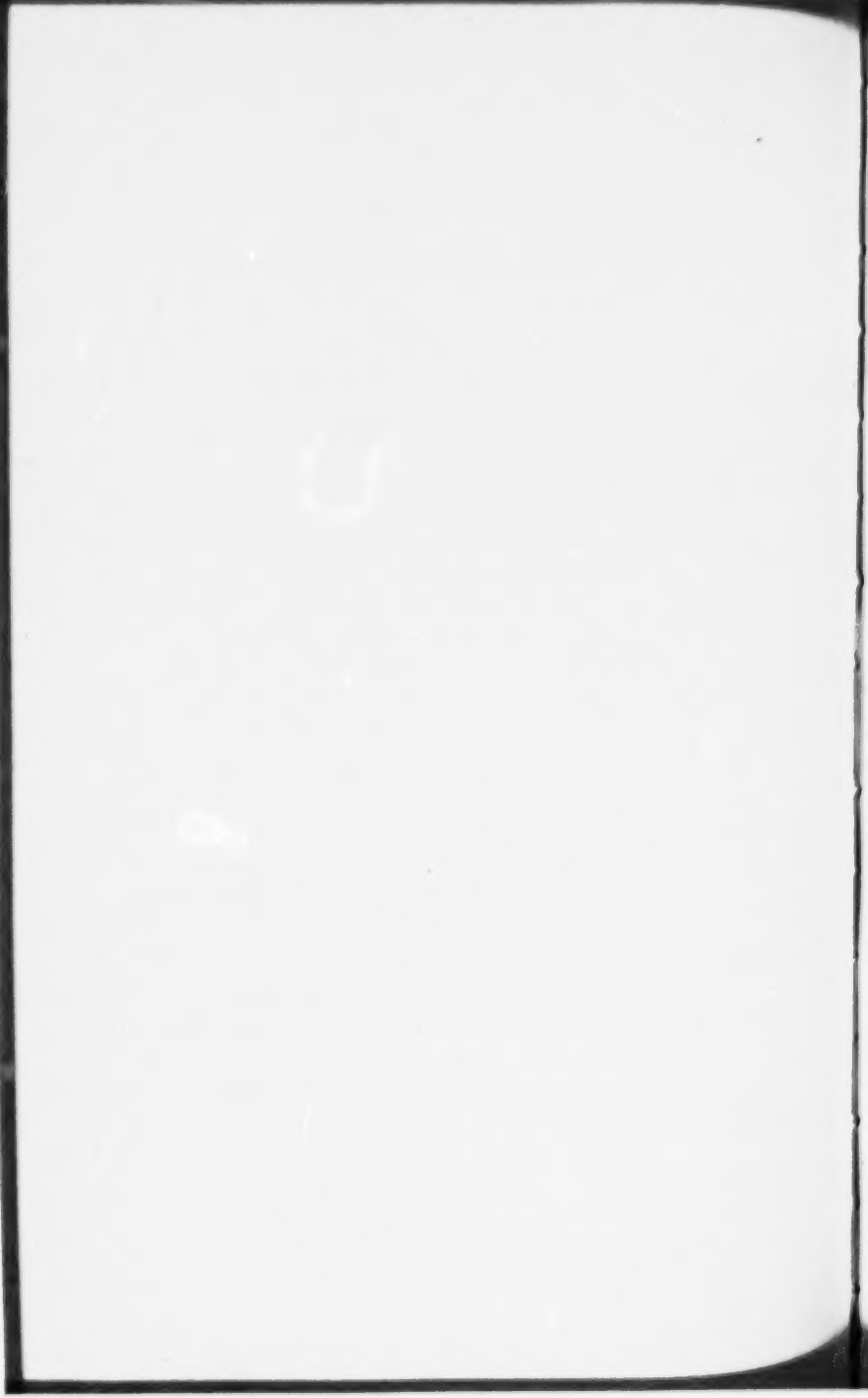

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 3012

EARL P. COOK,

Plaintiff,

vs.

BEN W. FORTSON, JR., AS THE DULY APPOINTED, QUALIFIED, AND ACTING SECRETARY OF STATE OF THE STATE OF GEORGIA; J. LON DUCKWORTH, CHAIRMAN OF THE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA; GRACE CANNINGTON, SECRETARY OF THE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA; AND THE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA, AN UNINCORPORATED ASSOCIATION,

Defendants

STATEMENT BY APPELLEES OF MATTERS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

MOTION TO DISMISS OR AFFIRM

To the Spreme Court of the United States:

Come now the appellees, defendants in the above styled cause, pursuant to Rule 12, Paragraph 3 of the Supreme Court of the United States, within fifteen (15) days from the service of the notice of appeal and appellant's statement to the jurisdiction, and file this their statement of

matters making against the jurisdiction of the Supreme Court of the United States to review the order or decree appealed from, and, as a part thereof, their motion to dismiss or affirm, and show:

1. The record fails to present a substantial federal question.

The vital portion of the law in this case under attack is set forth in Section 34-3217 of the Civil Code of Georgia of 1933 as follows:

"Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nomination for members of Congress, judges of the superior courts, solicitors general, members of the General Asembly and county officers; and this law shall not be construed to require a primary for any of the last-named officials, except in their respective districts, circuits or counties, as provided by law: Provided, however, that primaries for nomination of members of Congress, judges of the superior courts, solicitors general and members of the General Assembly shall be held on the date named in section 34-3212 for primaries for United States Senator, Governor, Statehouse officers, Justices of the Supreme Court and Judges of the Court of Appeals. (Acts 1917, p. 189.)"

The complaint alleges (Complaint, par. 2) and the undisputed evidence shows (Bill of Ex., p. 7) that on May 2, 1946, the State Democratic Executive Committee in formulating its rules provided as follows:

"Insofar as the Primary relates to the nomination of candidates for Congress from various Congressional Districts, such candidates shall be voted for only in the counties comprising their respective districts; and the Congressional Democratic Committee of each District

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shall determine whether the county unit or popular vote plan shall prevail."

The complaint alleges that the Fifth District Democratic Executive Committee adopted the county unit plan (Complaint, par. 2) and the undisputed evidence shows (Bill of Ex., pp. 13, 14) that the Congressional Democratic Executive Committee of the Fifth Congressional District of Georgia on May 3, 1946, adopted a rule providing as follows:

"A candidate receiving a plurality of the votes cast in a county shall be entitled to the unit vote for said county and the candidate receiving a majority of the county unit votes cast in said primary in said District shall name delegates from each county in the District to a convention of delegates to be held in the City of Atlanta, Georgia, on Saturday, July 27, 1946, at 11 o'clock A. M. in the Senate Chamber of the State Capitol. The delegates so appointed shall go to the convention and declare as the nominee the candidate who receives a majority of the County Unit votes cast in said primary.

"The number of delegates from each county shall be twice the number of representatives which said county has in the House of Representatives of Georgia.

"When said delegates have assembled in convention, they shall organize by the election of such officers as such convention may deem necessary and shall then proceed to declare as the nominee for Congress from the Fifth Congressional District the candidate receiving the majority of the County Unit votes cast in the primary."

The gist of the Georgia laws under attack is that they do not require any party to hold a primary, do not require a party candidate to be in any case chosen by a primary, nor require the state to pay the expenses of a primary if a party calls one; and they permit persons not chosen by any party

to have their names put on the official ballots at the election. *Chapman* v. *King*, 154 F. 2d 460, 463.

The complaint attempts to build a strawman, asking this court to take a discretionary congressional party rule for the nomination of a congressional candidate by the Democratic Party in the Fifth District of Georgia and engraft it onto the rules of the State Democratic Executive Committee as a party requirement of the state party organization which in turn it seeks to have engrafted onto the state law as a part of the state law and then attacks the local congressional party rule thus engrafted onto the law as being violative of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

It, therefore, affirmatively appears both from the petition and the undisputed evidence in the record that if complainant had been denied any right, which, of course, is not admitted, the denial was not by any act of the State of Georgia or the result of any law or statute of the State of Georgia, but was purely the action of a committee of a political party in a purely political matter.

It, also, affirmatively appears, from the code section above quoted and from the full law pleaded by complainant in the cause, there not only is no primary required but in the case of nominations for members of Congress by political parties, the statute specifically provides: "Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nominations for members of Congress * * *."

Unless the rights claimed to be denied by the complainant are rights denied to him by the State, the prohibitions set up in the Fourteenth Amendment do not avail the complainant and no substantial federal question is presented.

Cases believed to sustain this contention are: Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 835; *In re Virginia*, 100 U. S.

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339, 25 L. Ed. 676; *Iowa Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 76 L. Ed. 265; *Snowden* v. *Hughes*, 321 U. S. 1, 88 L. Ed. 497.

2. In the First Defense set out in the answer of appellees, and the facts therein set forth appear in the record without dispute, defendants alleged that complainant in this cause on the 2nd day of August, 1946, filed an identical suit against each of these same defendants jointly in the District Court of the United States of the Southern District of Georgia which suit was directed to the Augusta Division and which bore Number 160 of the Brunswick Division out of said Southern District of Georgia. Defendants contended that the present suit should be abated because of the pendency of the former action.

We contend that where two petitions are in substance the same, a dismissal of the second suit is proper on a plea in abatement.

We believe this rule of law is supported by the case of:

Francis v. *United States*, 5 Wall. 338, 18 L. Ed. 603.

3. The rights asserted by the appellants are purely political, and the questions involved are purely political questions. Whether or not the complaint presents a justiciable controversy, equity is without jurisdiction to enforce a purely political right. This is especially true of federal courts of equity.

Cases sustaining this contention are:

In re: Sawyer, 124 U. S. 200, 31 L. Ed. 402;

Walton v. *House of Representatives*, 265 U. S. 490, 68 L. Ed. 1116;

Taylor v. *Beckham*, 178 U. S. 548, 570, 44 L. Ed. 1187, 1195;

Giles v. *Harris*, 189 U. S. 475, 47 L. Ed. 909;

Lane v. *Wilson*, 307 U. S. 268, 83 L. Ed. 1281;

Colgrove v. *Green*, — U. S. —, 90 L. Ed. 1212.

The rule that a federal court of equity is without jurisdiction of political questions, or to enforce political rights, is so firmly established that the Supreme Court ought not to allow an appeal presenting such a question.

The amendment of appellants, hereinafter referred to, but emphasizes the political nature of the question presented.

4. The declaratory relief prayed for cannot be granted, because the case is not one appropriate for the grant of equitable relief.

Great Lakes Dredge & Dock Co. v. *Huffman*, 319 U. S. 293, 87 L. Ed. 1407;

Colgrove v. *Green, supra.*

5. No effective relief could now be granted to appellants by this Court or by the trial court, because the only prayer left in the complaint relates to a subject-matter of which the federal courts are without jurisdiction and seeks relief they are without power to grant.

All of the questions presented by the original complaint were moot at the time of the hearing before the statutory three-judge court. The original complaint sought to enjoin the Chairman and Secretary of the State Democratic Executive Committee from certifying the result of the July 17th primary to the Secretary of State. This certification had been made on August 5, 1946, and the complaint was filed August 8, 1946. Manifestly the court could not restrain an act which had been done before the suit was filed.

The complaint also sought to enjoin the Secretary of State from sending out the ballot forms to the ordinaries. This had been done, as required by a state law which is concededly valid, when the case was heard.

Consequently every question presented by the original complaint had become moot in the trial court and is now

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moot. No relief can be granted appellants with respect to these questions.

Mills v. *Green*, 159 U. S. 659, 40 L. Ed. 293;
Blackman v. *Stone*, 17 F. Supp. 102, 300 U. S. 641, 81 L. Ed. 856;
Jones v. *Montagu*, 194 U. S. 147, 48 L. Ed. 913.

Insofar as the complaint proceeds against the Secretary of State, both with respect to the relief sought in the original complaint and that sought in the amendment, it is in purpose and effect a suit against the State, because the Secretary of State, in all that he has done or may do acts under valid State laws, which are not attacked, and, therefore, represents the State in action and liability. See in this connection:

In re: Ayers, 123 U. S. 443, 31 L. Ed. 216;
Louisiana v. *Jumel*, 170 U. S. 711, 27 L. Ed. 448;
Antoni v. *Greenhow*, 107 U. S. 760, 27 L. Ed. 468;
Cunningham v. *Macon & Brunswick RR.*, 109 U. S. 446, 27 L. Ed. 992;
Hagood v. *Southern*, 117 U. S. 52, 29 L. Ed. 805;
Pennoyer v. *McConnaughy*, 140 U. S. 1, 35 L. Ed. 363;
Cargile v. *New York Trust Co.*, 67 F. (2) 585;
New York Trust Co. v. *Cargile*, 292 U. S. 625, 78 L. Ed. 148;
Ex Parte State of New York, 256 U. S. 490, 65 L. Ed. 1057;
Worchester Trust Co. v. *Riley*, 302 U. S. 292, 82 L. Ed. 268.

The State is an indispensable party to enable a federal court to grant the relief sought by the amendment, for it is against the State itself that the decree would operate. The

state has not consented to be sued, and the Court should, for that reason, decline jurisdiction.

Missouri v. *Fiske*, 290 U. S. 18, 27, 78 L. Ed. 145, 150;
Monaco v. *Mississippi*, 292 U. S. 313, 78 L. Ed. 1282.

6. The subject matter of this controversy if reviewable at all is exclusively one of which Congress itself has jurisdiction in that Article I, Section 5 of the Constitution of the United States provides:

> "Each house shall be the judge of the elections, returns, and qualifications of its own members * * *."

7. It appears without dispute under the pleadings and the evidence that the rights asserted by appellant are purely political.

As set out in conclusions of law in the opinion of the court in this case, "If the county unit be imposed in congressional primaries, it is by party action, not by state action. But at least as matters now stand, the county unit plan is not being applied by anyone. The State Executive Committee has refused to apply it and has certified both candidates, and both are on the ballots which are being printed, and every Democrat is free to vote for his choice, and the popular vote will determine in the general election. The plaintiff and those he represents will get exactly what they claim they should have. The double certification is in effect a cancellation of the primary, as respects these two candidates."

We submit that the questions presented are too insubstantial to require further argument and the time of this court to consider them.

8. The questions presented by the complaint and the appeal are inherently without merit, frivolous, and insubstantial.

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As shown by the undisputed evidence before the court in this case, the method of nomination was that chosen by the Fifth District Democratic Executive Committee as laid down in Rule 4 (Bill of Ex., pp. 13, 14) and it determined that a nominee of the Party from the Fifth Congressional District of Georgia would be selected in the primary to be held July 17, 1946, and that the selection of such nominee would be by a convention, the delegates to which would be chosen by the successful candidate holding a plurality of votes in each county of the district and would be chosen on the basis of the county unit, assigning to each county the number of votes in the convention, twice the number of its representatives in the General Assembly.

The effect of this discretionary party rule was that in the primary the voters in each county were not voting as to who should be nominated for Congress directly, but who would have the right to name the delegates to the Congressional convention to be thereafter held which in turn would select the party nominee to represent this district in the general election to be held November 5, 1946.

In the primary Judge James C. Davis, a duly qualified candidate who had signed the party pledge and paid the required entrance fee to the secretary of the duly constituted Democratic Executive Committee, received a majority vote in DeKalb County which under the rules was a six-unit county and the majority vote in Rockdale County which under the rules was a two-unit county. Mrs. Helen Douglas Mankin who, under the undisputed evidence as stipulated before the court (Bill of Ex., pp. 14, 15), repudiated the duly constituted Democratic Executive Committee for the Fifth District of Georgia, refused to qualify with the committee, refused to sign the pledge and refused to pay the entrance fee, was never certified to the County Executive Committees of the three counties by the legal congressional committee, but nevertheless had her name placed on th ballot by the

various county committees comprising the three counties of the district, and received a majority vote in Fulton County, a six-unit county.

Therefore, it appears that even though she failed and refused to sign a party pledge and pay the entrance fee and be certified by the proper party authority of the Congressional Party committee, nevertheless when she entered her name on the ballot in the primary she was bound by the rules of the party and bound to submit to the result. However, when the election was over and it appeared that Judge Davis had received eight unit votes, and, assuming the legality of her name on the ballot, Mrs. Mankin received six unit votes, she filed a contest with the DeKalb County Executive Committee seeking to void the county unit vote in a county in which her opponent had received the majority of the votes. Her contest was heard and denied and was carried to the State Democratic Committee as provided by the rules which are set forth (Bill of Ex., pp. 6, 7, 8, 9, 10, 11). A contest committee was convened to hear her appeal but failed to decide which one of the parties had prevailed, and merely directed that both names be entered on the ballot as the party nominees in the General Election, November 5, 1946 (Defendants' answer, Eighth Defense, par. 17, subpar. j).

The original complaint sought to enjoin the chairman and secretary of the State Democratic Executive Committee from certifying both Judge James C. Davis and Mrs. Helen Douglas Mankin as nominees of the party in the Fifth District of Georgia and sought a declaratory judgment directing that only the name of Mrs. Helen Douglas Mankin be certified.

The complaint was filed August 8, 1946, after this certification had been made to the Secretary of State on August 5, 1946. It also sought to enjoin the Secretary of State from

certifying both names to the ordinaries of the various counties (the ordinaries being constitutional county officials who supervise general elections, appoint the managers at each county precinct, and have the duty of providing all necessary forms which they have printed following the forms sent to them by the Secretary of State as to state offices and adding on the same ballot candidates for local offices).

No restraining order was granted upon the filing of the original complaint.

The Secretary of State mailed the ballot forms out to the ordinaries on August 12, 1946, fourteen (14) days before the expiration of the period within which the ordinaries were required to have military ballots printed and ready for distribution for soldiers requesting the right to vote under our absentee ballot law.

The appellant amended or sought to amend his original complaint by alleging that the plaintiff was a Democrat, qualified to vote in the general election to be held in November, 1946, and that he in good faith pledged to support the Democratic candidates for all officers to be voted on for this year; that the county unit plan or county unit basis of voting in a primary election and referred to and quoted from the Committee rules "is found and embodied in Acts 1917, pp. 183, 184, and codified in Section 34-3212 of the Code of Georgia of 1933, said section being attached hereto as an exhibit, etc."; and that the county unit plan and basis as applied to the said Democratic Primary Election of July 17, 1946, for a member of Congress from the Fifth Congressional District of Georgia "by the said Committee rules and resolutions was and is violative of the provisions of the Constitution of the United States herein elsewhere set forth for all of the reasons and grounds herein elsewhere set forth." The prayer on the amendment was that the primary laws referred to in the petition as amended be de-

cleared void as they "have been or may be applied to primary elections for nomination of the candidates for office of the members of the House of Representatives of the Congress of the United States, for all the reasons more fully pointed out in the complaint hereinbefore filed."

The cause was heard before a three-judge District Court on August 16, 1946. An order denying an itnerlocutory injunction was entered August 24, 1946, and filed August 26, 1946.

Appellees contend that no substantial federal question is involved because the right of the appellants to vote in a primary for the nomination of party candidates for State offices does not arise under the Constitution and laws of the United States, but under the laws of the State.

Cases believed to sustain this contention are:

Minor v. *Happersett*, 21 Wall. 162, 170, 22 L. Ed. 627, 629;

Ex parte Zarbrough, 110 U. S. 651, 664, 665, 28 L. Ed. 274, 275;

McPherson v. *Blocker*, 146 U. S. 1, 37, 38, 36 L. Ed. 869, 878;

Guinn v. *United States*, 238 U. S. 347, 59 L. Ed. 1340, 1346;

Breedlove v. *Suttles*, 302 U. S. 277, 82 L. Ed. 252, 256.

Appellees contend, therefore, that the complaint and the appeal are frivolous and without inherent merit because the law attacked specifically provides that no unit plan of election is required; Rule 8 of the State Democratic Executive Committee specifically provides that the congressional committees should determine whether in a particular district the county unit plan or popular vote plan should be adopted; because it appears from the rules of the Congressional Democratic Executive Committee (Rule 4, Fifth District

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Rules, Bill of Ex., pp. 13, 14) that they determined as a matter of discretion that in the primary to be thereafter held that the county unit plan be adopted as the system for the selection of delegates to a convention which in turn should make the nomination of the candidate; and because it further appears without dispute from the record that after the primary election when the matter came before a contest committee set up under the rules of the State Democratic Executive Committee, the contest committee decided that under the circumstances presented, the names of both parties should be placed on the ballot at the general election (Defendants' answer, Eighth Defense, par. 17, subpar. j).

Complainant's contentions before this court are, we believe, obviously without merit; and we suggest the apt language used by Judge Arthur Powell in the decision of *Bryan* v. *State*, 8 Ga. App. 389 (69 S. E. 121), as being applicable as follows:

"A point of legal argument may be well taken, or at least plausible, for one of two reasons,—because of its inherent merit, or because it states a proposition which, while not inherently meritorious, has gained standing by reason of its announcement by some court; for courts do sometimes, if not ofttimes, announce propositions that are not inherently sound, and these unsound announcements may become precedents. As the point here presented is palpably without point, inherently considered, and as no decision from this or any other court is cited in support of it, we are led to believe that its only noteworthy characteristic is its novelty."

Wherefore, appellees respectfully submit this statement showing that the questions upon which the decision of this Court depend are so insubstantial as not to need further argument or further consideration of this Court, and appel-

lees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment by the District Court of the United States for the Northern District of Georgia.

This 30th day of September, 1946.

EUGENE COOK,
Attorney General of Georgia;
VICTOR DAVIDSON,
Assistant Attorney General of Georgia;
JOHN A. DUNAWAY,
Special Deputy Assistant Attorney General of Georgia;
WALTER MCELREATH,
WILLIAM G. GRANT,
Attorneys for Appellees.

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MOTION TO ADVANCE BY APPELLANT

Comes now Appellant herein, by his counsel, and moves to advance this cause for early hearing and in support of the motion shows to the Court as follows:

Earl P. Cook as a qualified voter brought his action against Ben W. Fortson, Jr., as Secretary of the State of Georgia; J. Lon Duckworth, Chairman of the Democratic Executive Committee of the State of Georgia; Grace Cannington, Secretary of said Committee, and said Committee, for a Declaratory Judgment, and for additional relief by injunction, alleging that the rules of said Democratic Executive Committee and of the Fifth Congressional Democratic Committee imposed the "county unit rule" of election in a Democratic Congressional Primary held July 17, 1946; that said rules constituted a part of the election system under the laws of the State of Georgia, and praying the Court to declare said rules, and the statutes requiring or permitting the same, to be utterly unconstitutional and void, and to enjoin the defendants from action pursuant to said primary, for that said statutes and rules abridged the right and privilege of Appellant, and of each member of his class, to vote in said Congressional Primary election, for a candidate for Member of Congress, upon substantially an equal basis with each other elector in said Congressional District; said right being secured to Appellant by Article I, Section II, of the Constitution of the United States and guaranteed against abridgement or discrimination by Amendment XIV thereto.

Plaintiff-Appellant showed to a specially constituted three judge Court that he voted in said Primary election for the candidate who received both a plurality and a majority of all popular votes cast therein, but that, notwithstanding said candidate's election by popular vote, the authorities of the Democratic Party threatened to place upon the official ballot for use in the General Election to be held November 5, 1946, the name of the candidate who received a minority of the popular votes cast in said Primary election, but who received a plurality of the "county unit" votes.

Upon the trial and hearing of said cause, it was shown that the names of both the candidate who received the plurality and majority of popular votes cast in said primary election, and the candidate who received a minority of votes cast, but who received a plurality of the "county unit" votes, had been certified to the Secretary of State as candidates of the Democratic Party, and that, *pendente lite*, the Secretary of State had so certified both names to the Ordinaries of the Counties comprising the Fifth Congressional District.

Notwithstanding such certification, the candidate receiving the second highest number of popular votes, and the plurality of "county unit" votes, has entered an appeal from such certification to the Convention of the Democratic Party, to be held October 9th, 1946, and the candidate who received the plurality and majority of popular votes cast as aforesaid may, by said Convention, be declared not to be a candidate of the Democratic Party.

The three judge Court held in substance that the case was controlled by the majority opinion of this Court in *Colegrove* v. *Green* (No. 804, October Term, 1945), that the issues presented in the instant case were of a political nature and therefore not proper for judicial determination. Injunctive relief was denied.

The public interest is involved. The questions presented are of great importance. An early decision is desirable in order that the electors of the Fifth Congressional District of Georgia may know, if possible, before the General Election to be held November 5, 1946, who is the legally qualified candidate therein of the Democratic Party.

Wherefore, Appellant prays that the case be advanced upon the calendar and assigned for hearing at an early date.

Respectfully submitted,

ALEX. W. SMITH

CROOM PARTRIDGE

Counsel for Appellant.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 531

EARL P. COOK, *Appellant*

vs.

BEN W. FORTSON, JR., *as the duly appointed, qualified, and acting Secretary of State of the State of Georgia;*

J. LON DUCKWORTH, *Chairman of the Democratic Executive Committee of the State of Georgia;*

GRACE CANNINGTON, *Secretary of the Democratic Executive Committee of the State of Georgia; and the*

DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA, *an unincorporated association,*

Appellees.

PETITION FOR REHEARING

To the Supreme Court of the United States:

Now comes EARL P. COOK, and files this his Petition for Rehearing in the above-numbered case, pursuant to Rule 33 of the Court, and for cause, and in support thereof, respectfully shows to the Court as follows:

THE COURT ERRED IN DISMISSING THE APPEAL ON THE GROUND THAT THE ISSUES WERE MOOT.

The Per Curiam order entered herein must be read in the light of the Per Curiam order cited therein, viz,

> UNITED STATES v. ANCHOR COAL COMPANY, 279 U.S. 812.

The pertinent language from the cited case follows:

> "These appeals have been fully argued and considered, but in the present situation we find that they present moot issues and that further proceedings on the merits can neither be had here nor in the court of first instance. . . . the controversy involved has become moot and, therefore, is no longer a subject for appropriate judicial action."

In so holding in the instant case, Petitioner respectfully insists that this Court has committed grievous error.

> "Upon this point a page of history is worth a volume of logic."
>
> Mr. Justice Holmes, in NEW YORK TRUST CO. v. Eisner, 256 U.S. 345, 349.

It should be kept in mind that the fundamental controversy involved in the case at bar is as to whether the "county unit system" of counting votes is constitutional or not, as applied to Congressional elections.

On authority of

> MILLS v. GREEN, 159 U.S. 651;
>
> LORD v. VEAZIE, 8 How. 251; and

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AMERICAN WOOD PAPER CO. v. HEFT,
131 U.S. xcii,

Petitioner prays leave of the Court to submit extrinsic evidence which will show that, since the appeal in the instant case was docketed in this Court on September 23, 1946, and since October 28, 1946, when this Court held that the controversy was moot, several important events have transpired, and "judicial action" has been taken, all designed to deprive Petitioner and the class he represents of the rights asserted by him in the instant case.

As a background for such a showing, Petitioner requests the Court to keep in mind the following excerpts from the opinion of the District Court in this action. (See STATEMENT AS TO JURISDICTION, herein, *Appendix*, p. 10, et seq.):

> "It (the answer) set up, too, that on a contest the Contest Committee of the Democratic Executive Committee has decided that both the leading candidates should be certified to the Secretary of State as the Democratic nominees and this had in fact been done. . . . It was alleged that there was confusion as to who rightly constituted the Fifth District Congressional Committee, and this was the reason for deciding that both names should go on the ballot as Democratic nominees; and that an appeal is now awaiting action of the State Democratic Convention in October; and that because of the confusion it is better to leave the matter alone. The Secretary of State has already distributed to the Ordinaries of the counties of the Fifth District to be printed forms of ballots bearing the names of both nominees. . . ."
>
> ". . . The facts above stated are found to be true."

Conclusions of Law.

> " . . . But at last as matters now stand, the county unit rule is not being applied by anyone. The State Executive Committee has refused to apply it and has certified both candidates, and both are on the ballots which

are being printed, and every Democrat is free to vote for his choice and the popular vote will determine in the general election. The plaintiff and those he represents will get exactly what they claim they should have. The double certification is in effect a cancellation of the primary, as respects these two candidates. We cannot speculate on what the State Convention may do in October. At present we see nothing that ought to be enjoined, even if that remedy be available in such a case as this."

Since that opinion was written, and since this appeal was docketed in this Court, the following events have transpired, and the following judicial action has been taken:

1. On October 9, 1946, the State Democratic Convention took action upon the appeal of candidate James C. Davis, from the ruling of the Contest Committee naming both himself and Helen Douglas Mankin as candidates of the Democratic Party, and held that James C. Davis was the sole nominee of said Party for Congress, from the Fifth District of Georgia.

2. On October 12, 1946, notice of the action of the Convention was given to Ben W. Fortson, Jr., as Secretary of State of Georgia (Respondent herein), and demand was made upon him, by the authorities of said Party, that he certify to the Ordinaries in said Fifth District, the name of James C. Davis as the sole nominee of said Party for said seat in Congress. Said demand was refused.

3. On October 14, 1946, said James C. Davis filed his petition for mandamus against said Secretary of State, in the Superior Court of Fulton County, Georgia, seeking a mandamus absolute to compel said Secretary of State of Georgia to determine the issue as between said Helen Douglas Mankin and said James C. Davis as to who was the rightful nominee of the Democratic Party for said office, in the General Election to be held November 5, 1946, and to make certification thereof as required by law, to the Ordinaries in said District.

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After the Per Curiam Order entered herein on October 28, 1946, ordering the dismissal of the appeal on the ground that the issues were moot, the following "judicial action" occurred in the State of Georgia:

1. On October 28, 1946, the Superior Court of Fulton County, Georgia, in the mandamus proceeding above mentioned, granted a mandamus absolute against said Secretary of State of Georgia (Respondent herein), commanding him to determine the issue as between said Helen Douglas Mankin and James C. Davis, as to who was the rightful nominee of the Democratic Party for the United States House of Representatives from the Fifth Congressional District of Georgia in the General Election to be held November 5, 1946, and to make certification thereof as required by law to the Ordinaries of DeKalb, Fulton, and Rockdale Counties.

2. On October 30, 1946, the Supreme Court of the State of Georgia declined to grant a supersedeas staying said mandamus absolute, on the ground that the case *would become* moot before that Court could decide it.

3. On November 1, 1946, Ben W. Fortson, Jr., as Secretary of State of Georgia (Respondent heren), pursuant to the command of said mandamus absolute, determined the issue as between said candidates, and certified to the aforementioned Ordinaries, as the sole and rightful candidate of said Party in said election, the name of Candidate James C. Davis, who received a *minority* of the votes cast in said primary election, but who received a *majority* of the "county unit" votes.

4. Thereafter, the ballots for use in said general election were printed, and the voting machines set up, without the name of Helen Douglas Mankin appearing thereon as a candidate.

5. In the general election of November 5, 1946, Helen Douglas received a minority vote (by write-ins) against a majority vote for James C. Davis, according to published returns.

By extrinsic evidence, Petitioner would show, further, that

the effect of the aforementioned mandamus absolute was to require the Secretary of State of Georgia to choose the Member of the House of Representatives from the Fifth Congressional District of Georgia (there being no other candidate on the official ballot, and Democratic nomination in Georgia being equivalent to election), whereas, the Constitution (Article I, Section II, Clause i) provides that:

> "The House of Representatives shall be composed of Members chosen every second Year by the People. . . ."

Whereupon, Petitioner prays leave to offer proof thereof.

Under the circumstances, Petitioner finds himself in this peculiar situation:

> On October 28, 1946, his appeal was dismissed because, in the language of U. S. v. ANCHOR COAL CO., *supra*, which the Court must have intended to adopt, ". . . the controversy has become moot and, therefore, is no longer a subject appropriate for judicial action." It was too late, therefore, if said order be adhered to, for this Court to issue a Declaratory Judgment, holding that the "county unit" system is unconstitutional.
>
> Since that date, however (as has been stated, and as will be proven upon permission granted), Petitioner has, by "judicial action" in the State of Georgia, been deprived of the last vestige of his Constitutional right to choose his representative in the Congress.

"It may be," as said by Mr. Justice Rutledge in his dissenting opinion herein, "that the orders now in appeal have become moot in part because actions in execution of the challenged Georgia laws which appellants sought to have restrained have now taken place." But, as it pointed out, ". . . declaratory relief, appropriate in many instances where aid by way of injunction cannot be afforded, is sought."

cf. LOVE v. GRIFFETH, 266 U.S. 32, 34.

It is interesting to note that even Appellees have not contended that the controversy is moot as to the declaratory relief sought. Simply, they rely upon the proposition that

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> "The declaratory relief prayed for cannot be granted, because the case is not one appropriate for the grant of equitable relief."
>
> (See Pars. 4, 5, of STATEMENT BY APPELLEES OF MATTERS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED SATES, and MOTION TO DISMISS OR AFFIRM, p. 6.)

Evidently, the Court reached its conclusion *sua sponte*. And, in refusing to note "probable jurisdiction," it is respectfully submitted that the Court actually and legally assumed and exercised jurisdiction by adopting the language in U. S. v. ANCHOR COAL CO., *supra*, that

> ". . . the controversy involved has become moot, and, therefore, is *no longer* a subject appropriate for judicial action."

Without laboring the point, Petitioner insists that if the controversy is "*no longer* a subject appropriate for judicial action," obviously at one stage of the proceedings it was. There exists, then, no question of jurisdiction in the technical sense, and it is respectfully insisted that there is nothing in the record which was before the Court on October 28, 1946, which would indicate that the controversy as to declaratory relief was moot.

In view of the decisions in

MILLS v. GREEN, *supra*,

LORD v. VEAZIE, *supra*, and

AMERICAN WOOD PAPER CO. v. HEFT, *supra*,

it would appear that the question as to whether or not a controversy is moot is one of fact, since, in those cases, the fact was proven by extrinsic evidence. As yet, the only facts before the Court are set forth in an abridgment of the pleadings in the cause in the opinion of the Distrct Court below. Upon those facts, the trial Court found:

> "At present we see nothing that ought to be enjoined, even if that remedy be available in such a case as this."

THE COURT IS NOT REQUESTED TO JUDGE AN ELECTION, BUT TO PASS UPON THE CONSTITUTIONALITY OF THE ELECTION MACHINERY.

It is quite true that, under the Constitution (Article I, Section V, Clause 1):

> "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . ."

Likewise, it is true, however, that:

> "The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution. . . ." (Article I, Section II, Clause 1.)

As was said in

McPHERSON v. BLACKER,

146 U.S. 1, 23:

> "But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws, and its validity was sustained."

It is respectfully submitted that this Court has the "judicial power," the right, and the duty, to declare whether or not the laws of Georgia and the rules of the Democratic Party adopted by virtue thereof, imposing the "county unit" rule in Congressional primary elections, are Constitutional. Its jurisdiction was invoked in advance of the General Election, and before the name of any candidate finally was certified to the ballot for use in such election.

If, hereafter, the House of Representatives is called upon to judge of the election of its Member from the Fifth Congressional District of Georgia, it should be entitled to know whether the election machinery set up by and under the laws of the State of Georgia, is constitutional or not. Let this Court judge of the validity of the laws, and the House judge of the election, in the light of the Court's judgment.

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Under the decision of the Fifth Circuit Court of Appeals in

CHAPMAN v. KING,

154 F. (2d) 460 (Cert. denied),

a Democratic primary election is, beyond question, a part of the "public election machinery" of the State of Georgia.

As was said of such a primary in

U. S. v. CLASSIC,

313 U.S. 299, 314:

> "Interference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus, as a matter of law and in fact, an interference wth the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district. The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman. The right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice."

If the imposition of the "county unit" system in the Congressional primary of July 17, 1946, was State action, it was unconstitutional.

If the "county unit" system, so imposed, was unconstitutional, as alleged, then Petitioner and the members of his class have been deprived of their vote

> ". . . at the only stage of the election procedure when their choice is of significance. . . ."

If the primary be

> ". . . at the only stage of the election procedure when their choice is of significance,"

then the General Election was purely formal and of slight, if any, legal significance.

To require the House of Representatives, as the judge of an election, to look past the General Election, and past the Democratic Primary, and to decide upon the Constitutionality of the "election machinery" provided by the State of Georgia, is to impose upon it, or surrender to it, the duty which was placed upon this Court by the Constitution, and to invite and require the House to invade the jurisdiction and the proper sphere of action of this honorable Court.

Petitioner respectfully concludes that he has been illegally deprived of his Constitutional right to vote for a member of Congress from his district on a basis substantially equal to every other voter in the District. By a per curiam order, with three Justices dissenting, this Honorable Court has summarily dismissed the direct appeal to this court authorized by statute, and seeking to right this wrong. Such dismissal has been ordered without hearing or argument, on preliminary consideration of an abridged statement or outline of the case in the Jurisdictional Statement required under Rule 12, and a motion by appellees to dismiss or affirm, to which petitioner filed a short reply. Petitioner files herewith, and in support of this petition, his further brief and argument covering the full merits of the case, and respectfully asks the Court to consider same, to the end that the living character, gravity and merit of the case may be disclosed to the Court.

WHEREFORE, Petitioner respectfully moves this Court, by appropriate action, to withdraw its Per Curiam order entered herein on October 28, 1946, declaring the controversy to be moot; that the Court formally note jurisdiction, and that this important case be heard and considered upon its merits.

ALEX. W. SMITH,

CROOM PARTRIDGE,

Counsel for Appellant-Petitioner.

We, Alex. W. Smith and Croom Partridge, counsel for the above-named Appellant-Petitioner, do hereby certify that the statements of fact made in the foregoing petition for rehearing of this cause are true and that the petition is presented in good faith and not for delay.

ALEX. W. SMITH,

CROOM PARTRIDGE,

Counsel for Appellant-Petitioner.

Atlanta, Georgia.

No. 531. COOK *v.* FORTSON, SECRETARY OF STATE, ET AL.; and

No. 532. TURMAN ET AL. *v.* DUCKWORTH, CHAIRMAN OF THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE, ET AL. Appeals from the District Court of the United States for the Northern District of Georgia. October 28, 1946. *Per Curiam:* The appeals are dismissed and the District Court is directed to dismiss the bill in each case. See *United States* v. *Anchor Coal Co.*, 279 U. S. 812. MR. JUSTICE BLACK and MR. JUSTICE MURPHY are of the opinion that probable jurisdiction should be noted. MR. JUSTICE RUTLEDGE is of the opinion that the question of jurisdiction should be postponed to the hearing of the cases on the merits and has set forth his views in an opinion (*infra*) which he has filed. *Alex. W. Smith* and *Croom Partridge* for appellant in No. 531. *Charles S. Reid, W. D. Thomson, Marshall L. Allison* and *John L. Tye* for appellants in No. 532. *Eugene Cook*, Attorney General of Georgia, *Victor Davidson, C. E. Gregory, Jr.*, Assistant Attorneys General, *John A. Dunaway, Walter McElreath, Samuel D. Hewlett* and *B. D. Murphy* for appellees. Reported below: 68 F. Supp. 624, 744.

MR. JUSTICE RUTLEDGE.

These appeals seek to invalidate Georgia's county unit system for selecting candidates for election to public office. No. 531 relates to the office of Representative in Congress, No. 532 to that of Governor. In each instance the basic substantive claim is that the system operates to deprive the appellants and other voters of the equal protection of the laws in respect to their rights of suffrage, contrary to

the provisions of the Fourteenth Amendment. Presented also are important questions of jurisdiction and of discretion in exercising it.[1] Both declaratory relief and injunctive relief in various forms were sought.

The District Court in each case denied applications for interlocutory injunctions. At the same time it formally declined to pass finally upon motions to dismiss the causes, although stating "We consider them, however, on the general question of the grant of interlocutory relief."[2] The court then went on to deny the applications upon grounds which, if sustained, would conclude the entire controversy in each case in all but formal entry of an order for dismissal.[3] The principal ground of decision in both cases was reliance upon *Colegrove* v. *Green*, 328 U. S. 549, decided June 10, 1946, rehearing denied this day, 329 U. S. 825, as precluding equitable relief. In No. 532 it was said this was required "whether it be that the subject matter is not of equitable cognizance, or merely that equity should withhold its hand."

In each case, however, the court refused to rest on this ground alone. In No. 531 it went on to rule, apparently, that the county unit system is imposed by party action, not by state action; and that the system was not being

[1] The jurisdiction of this Court is invoked under §§ 238 and 266 of the Judicial Code as amended, 28 U. S. C. §§ 345, 380. In No. 532 it is not questioned that the attack is upon the validity of a state statute. In No. 531 one ground of appellee's motion to dismiss the appeal is that the appellant's suit attacks, not a state statute, but the rules and action of a political party. Cf. *Ex parte Collins*, 277 U. S. 565, 569.

The two decisions were rendered by three-judge District Courts, constituted identically, pursuant to § 266 of the Judicial Code.

[2] The quoted language is from the opinion in No. 532. A similar statement appears in the opinion in No. 531.

[3] In view of this fact an affirmance of the judgments here would preclude the District Court from taking any other action than to dismiss the causes, upon their being remanded to it.

applied in fact, since the state executive committee prior to the decisions had certified both candidates, subject to later action by the party's state convention. In No. 532 "in order that all questions may be ripe for consideration in the Appellate Court, if necessary," the opinion further stated that "on the ultimate merits we do not think the State of Georgia has been shown to have deprived the plaintiffs of the equal protection of the laws." The decisions come here therefore not only as somewhat dubious rulings upon strictly jurisdictional matters but as decisive and conclusive adjudications upon the merits.

It may be that the orders now in appeal have become moot in part because actions in execution of the challenged Georgia laws which appellants sought to have restrained have now taken place.[4] But in No. 532 in one respect at least injunctive relief prayed for still could be given, if appellants should be found, on hearing, entitled to have it.[5] And in each case declaratory relief, appropriate in many instances where aid by way of injunction cannot be afforded,[6] is sought.

Obviously the appeals present questions related closely to the issues in *Colegrove* v. *Green*, but in my opinion not

[4] Thus, in No. 532, party officials have certified the results of the primary elections to the Secretary of State and he in turn has sent out the forms for ballots to county ordinaries on the basis of those certifications. The applications sought to restrain these acts.

[5] By amendment, to avoid the effect of the actions taken as set forth in note 4, appellant sought to restrain the Secretary of State from certifying the returns from the general election to the General Assembly.

[6] It was to avoid the limitations resulting from the fact that injunctive or other immediately effective equitable relief could not be given that relief by way of declaratory judgment was authorized by Congress. This Court has not yet determined that declaratory relief cannot be given beyond the boundaries fixed by the preexisting jurisdiction in equity, compare *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 262, with *Giles* v. *Harris*, 189 U. S. 475, 486, although three

necessarily determined by that decision. A majority of the justices participating refused to find that there was a want of jurisdiction, but at the same time a majority, differently composed, concluded that the relief sought should be denied.[7] I was of the opinion that, in the particular circumstances, this should be done as a matter of discretion, for the reasons stated in a concurring opinion. 328 U. S. 549, 564. Those reasons would be pertinent to a consideration of the present appeals, though not necessarily controlling in relation to the somewhat different facts and issues they involve.[8] The issues, whether of jurisdiction, of discretion in exercising it,[9] or of substantive right, are obviously important. In my judgment they have not been conclusively adjudicated by prior decisions of this Court. I therefore think they should not be determined without full hearing and consideration after argument here, more especially in view of the breadth and character of the rulings made in the District Court's decisions. Accordingly I think we should postpone determination of any jurisdictional issues until consideration of the merits and place the appeals upon the calendar for argument. I also think that if these appeals were to be so

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members of the Court announced their view apparently to that effect in *Colegrove* v. *Green*, 328 U. S. 549, 551–552. The outer boundaries of jurisdiction under the declaratory procedure remain largely undetermined. Cf. Judicial Code § 274d, 28 U. S. C. § 400; Borchard, Declaratory Judgments (2d ed. 1941) 365–367, 766–788, 868–874.

[7] Three of the justices so ruling thought the relief should be denied for want of jurisdiction. 328 U. S. 549, 550, opinion of MR. JUSTICE FRANKFURTER.

[8] The discretionary exercise or nonexercise of equitable or declaratory judgment jurisdiction, see *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 300; *Di Giovanni* v. *Camden Fire Ins. Assn.*, 296 U. S. 64, 70, in one case is not precedent in another case where the facts differ. *Hale* v. *Allinson*, 188 U. S. 56, 77–78, quoted in *Di Giovanni* v. *Camden Fire Ins. Assn.*, *supra*, at 71.

[9] See note 3.

treated, the petition for rehearing which has been filed in *Colegrove* v. *Green* should be granted and that case should be set for argument with them.